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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

Alfred P. Christoffersen; William J. Gibson; Richard F. Main; and John R. Warn,

Petitioners,

vs.

Major General Robert J. Collins, former Adjutant General, of Washington State; Major General George Coates, Adjutant General, of Washington State; Robert S. O'Brien, Treasurer, State of Washington; Lieutenant General LaVerne E. Weber, former Chief National Guard Bureau; Lieutenant General Emmet H. Walker Jr., former Chief National Guard Bureau; the Washington State Air National Guard; the Air National Guard of the United States; the United States Government through its agencies; the Department of the Air Force; the Department of Defense; and the National Guard Bureau,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR CERTIORARI

CHARLES MATTHEW ANDERSEN
WINSTON & CASHATT
19th Floor
Seafirst Financial Center
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

This case presents the claims of four federal employees (Air National Guard Technicians) who were prematurely terminated from their employment in violation of a regulation directing qualified Technicians to remain in federal service to age fifty-five (55). The sole basis for termination was the non-reviewable decision of a State employee (the Washington State Adjutant General) that was made in retaliation for petitioners exercising their First Amendment rights in "blowing the whistle" to protect nuclear weapons. Despite repeated attempts, no court has been willing to review the decision to terminate these whistle blowers. This case raises the following significant constitutional questions for review:

1. Is the District Court barred from allowing a trial of a First Amendment violation because the claim arises out of a military personnel decision that purports to be non-reviewable?

2. May the Constitutional claims of members of a State Militia, not in active federal service, be barred by the standards for review of military decisions set forth in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971)?

3. Has Air National Guard Separation Regulation ANGR 36-06 been correctly adopted, both substantially and procedurally?

TABLE OF CONTENTS

Page

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

A. NATURE OF THE CASE 4

B. THE NATIONAL GUARD STRUCTURE 6

1. The Federal Agency 6

2. The State Agency 7

C. THE TECHNICIAN 7

D. THE CUSTOM 8

E. THE REGULATION, ANGR 36-06 10

1. Vitalization 10

2. How Regulation was Adopted 11

F. MAJOR GENERAL COLLINS' ACTION 12

G. THE INCIDENT 13

1. The Regulation 13

2. Petitioners' Actions 14

3. WANG's Response 15

4. Political Retaliation 16

5. Effect of Action on the Petitioners 17

6. National Significance 18

TABLE OF CONTENTS – Continued

Page

H. FEDERAL JURISDICTION 18

REASONS FOR GRANTING CERTIORARI 19

A. CONFLICT AMONG THE NATION'S LOWER COURTS 19

1. The Ruling in *Bollen v. National Guard Bureau*, 449 F. Supp. 343 (1978) 19

2. Conflict with the Court of Claims..... 21

3. Conflict with its Ruling in *Sebra v. Neville*, 801 F.2d 1135 (9th Cir., 1986) 22

B. SIGNIFICANT ERROR HAS OCCURRED WHICH REQUIRES CORRECTION..... 22

1. The Court Decision Challenges the Integrity of the Technician's Program..... 22

2. No Trial on the Merits has been Allowed .. 23

3. The Decision Defeats the Very Purpose of Public Service 24

4. The Court's Ruling Supports an Invalid Regulation 24

RELIEF..... 25

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Bollen v. National Guard Bureau, 449 F. Supp. 343 (1978) 19, 20

Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, 6 L.Ed.2d 1230 (1961) 19

Chappell v. Wallace, 462 U.S. 296 (1983) 24

Christoffersen v. U.S., 230 Ct. Cl. 998, 1004 (1982) App. 55 21

Gaston v. U.S., 34 A.2d 353 (N.Y.D.C. Mun. App. 1943), *cert. denied* 322 U.S. 764 6

Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) ..... i, 20, 21, 22, 24

Muhammad v. Sec. of Army, 770 F.2d 1494, 1495 (9th Cir. 1985) 22

Proprietors Ins. Co. v. U.S., 688 F.2d 687, 689 (9th Cir. 1982 and CR 148, p. 12) 8

Sebra v. Neville, 801 F.2d 1135 (9th Cir., 1986) 22

Stark v. Wickard, 321 U.S. 288 (1943) 25

Tennessee v. Dunlap, 426 U.S. 312 (1976) 23

CONSTITUTIONAL PROVISIONS

Amendment I ..... i, 2, 5, 20

Amendment V 2, 24

Amendment XIV 3, 24

TABLE OF AUTHORITIES – Continued

Page

STATUTES

10 U.S.C. § 3015 ..... 5, 6

10 U.S.C. § 8012 ..... 6, 11

10 U.S.C. § 8013 11

10 U.S.C. § 8033 11

10 U.S.C. § 8034 11

10 U.S.C. § 8033(a) 11

10 U.S.C. § 1552 21

28 U.S.C. § 1491 ..... 1, 18, 21

28 U.S.C. § 1254(1) 2

32 U.S.C. § 709 4

32 U.S.C. § 709(b) 4

32 U.S.C. § 709(e) 5

32 U.S.C. § 709(e)(1) 21

32 U.S.C. § 101 11

32 U.S.C. § 101(3) 6

32 U.S.C. § 102 6

32 U.S.C. § 110 6

42 U.S.C. § 1983 ..... 1, 3, 19

1958 U.S. Cong. and Adm. News. pp. 3280-3281 7

TABLE OF AUTHORITIES – Continued

Page

RCW 38.08.020 7

RCW 38.12.015 7

RCW 38.12.180 7

REGULATIONS

ANGR 36-05, Change B, 31 Dec. 1968 ..... 3, App. 8

ANGR 36-05 ¶ 13a(10) 10

ANGR 36-06 ..... *passim*

ANGR 36-06, 7 Oct. 1977 ..... 4, 10, App. 9

ANGR 36-06 ¶ 10e(4) ..... 10, App. 66

Petitioners respectfully pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, entered on August 31, 1988, as to which a timely petition for rehearing was denied on December 15, 1988.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 855 F.2d 1437, and is reprinted in Appendix 3 (App. 24-44, infra).

The opinions of the United States District Court for the Eastern District of Washington were not published, but are reprinted in Appendix 1 and 2 (App. 1-12 and App. 13-23, infra).

The opinion of the United States Court of Claims is reported at 230 Ct. Cl. 998 (1982), and is reprinted in Appendix 6 (App. 47-55 infra).

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, petitioners brought suit in the Eastern District of Washington on September 23, 1981. In separate opinions filed March 21, 1984, and October 11, 1985, the Court denied petitioners' Motion for Summary Judgment and granted respondents' Motion for Summary Judgment. (*See* App. 1 and App. 13, infra.)

Invoking federal jurisdiction under 28 U.S.C. § 1491, petitioners had also brought suit in September of 1980

against the United States Government in the then U.S. Court of Claims. On May 28, 1982, the Court denied petitioners' claim for lack of jurisdiction over a National Guard member not in active service. (*See* App. 47, infra.) This opinion was *not* appealed.

On petitioners' appeal, the Ninth Circuit on August 31, 1988 entered an opinion affirming the ruling of the U.S. District Court. (*See* App. 24, infra.) A petition for rehearing was filed. Order denying the petition was filed on December 15, 1988. (*See* App. 45, infra.) The order affirming the District Court was filed December 27, 1988 in the United States District Court. (*See* App. 46, infra.)

The jurisdiction of this Court to review the judgment of Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS.

AMENDMENT I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech,** or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life,**

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law;** nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES.

42 U.S.C. § 1983:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

82 Stat. 755 – National Guard Technicians Act of 1968. (*See* Appendix 10, App. 71-84, infra.)

REGULATIONS.

ANGR 36-05, Change B, 31 Dec. 1968. Separation of Air National Guard Officers. (*See* Appendix 8, App. 57-58, infra.)

ANGR 36-06, 7 Oct. 1977, Selective Retention of Air National Guard Officer Personnel. (*See* Appendix 9, App. 59-70, infra.)

STATEMENT OF THE CASE

The facts of this case are not challenged and are straightforward. The situation of petitioners is similar to approximately 45,000 other National Guard Technicians. Appreciation of the significance of the issues raised requires, however, an understanding of the role of the State National Guards and how they interrelate with the federal defense structure.

A. NATURE OF THE CASE.

Each petitioner was a high-ranking officer in the Washington Air National Guard (WANG) and had an exemplary service record. Each petitioner was also a highly-rated and qualified full-time federal civil servant in the position of an Air National Guard Technician (Technician). 82 Stat. 755, codified in part at 32 U.S.C. § 709. By statute, employment as a Technician requires membership in the National Guard. 32 U.S.C. § 709(b). The jurisdictional conflict created by this "dual status" is at the heart of petitioners' case.

The State Guard organizations are responsive to the U.S. Departments of the Army and Air Force. The National Guard Bureau (NGB) is a statutory agency

within the Department of Defense. The NGB's sole purpose is to channel communications between the departments of the Army and Air Force and the various State Guards. 10 U.S.C. § 3015. In 1977, the NGB published a regulation which compels retirement of Guard officers with more than twenty (20) years service, unless selected for retention by a Board of Officers. ANGR 36-06 (App. 59, infra). State actions taken in reliance or this federal regulation form the factual basis of the case.

In 1978, WANG convened its first ANGR 36-06 Board. Each petitioner *was selected* for retention by the Board as the "most qualified." Without a stated reason, the State's Adjutant General, MG Collins, chose to override the decision and "involuntarily retired" each petitioner from the WANG. The unchallenged affidavits submitted on the motion show the basis of the decision was personal animus for petitioners' exercising their First Amendment rights in an earlier incident involving the safekeeping of nuclear weapons. MG Collins knew that his decision would cause each petitioner to lose his federal employment as a Technician by operation of law. 32 U.S.C. § 709(e).

The terminations have never been reviewed by a military or civil service tribunal. The District Court and the Court of Claims refused to hear petitioners' claims. Respondents acknowledge that no remedial procedure is available to petitioners. At issue is the judicial tension created between the ability to challenge a termination which violates a basic Constitutional right and military decision making in the National Guard, which denies *any* review!

B. THE NATIONAL GUARD STRUCTURE.

Because many federal and state organizations impact the issues in this case, it is necessary to review the controlling statutory scheme.

1. The Federal Agency.

The National Guard is a creature of federal statute which seeks to integrate the State/Territory Militias in the overall defense strategy of the United States. 32 U.S.C. § 102. The Federal Government funds the personnel and equipment of the National Guard. The National Guard is composed of the Army and Air National Guard. 32 U.S.C. § 101(3).

Regulations governing the Guard are prescribed by the President as delegated to the Department of Defense. 32 U.S.C. § 110; *Gaston v. U.S.*, 34 A.2d 353 (N.Y.D.C. Mun. App. 1943), *cert. denied* 322 U.S. 764. The Secretary of Defense directs the affairs of the Air Force and Air Guard through the Secretary of the Air Force. 10 U.S.C. § 8012. If a Guardsman has been "federalized" by order of the Air Force, he is as any other reserve member of the Air Force. Otherwise, he is a State employee. All actions in this case arise out of a "non-federalized" status.

As noted, to assist the Defense Department in communicating with the various State Guards, there has been created a National Guard Bureau (NGB). 10 U.S.C. § 3015. Congress did not intend a consolidation of any duties or functions in that office, including the lack of power to

adopt regulations. Its sole function is a communication channel with the State Guard organizations. 1958 *U.S. Cong. and Adm. News*, pp. 3280-3281.

2. The State Agency.

The Militia of Washington State is led by the Governor. The Adjutant General is the executive head. RCW 38.08.020. The State Militia is divided into two departments, the Army and the Air Guard, which are each headed by the Adjutant General. RCW 38.12.015. Unless "federalized," the Guard is a state agency.

Officers in the "organized Militia" of the State of Washington are eligible to remain in service until age 64, unless terminated for cause. RCW 38.12.180. Petitioners were not subject to any mandatory military retirement provisions of the laws of the State of Washington. There is no contention that petitioners were dismissed for cause.

C. THE TECHNICIAN.

Petitioners' federal civil service position was created by the National Guard Technicians Act of 1968. (*See* App. 71, infra.) Technicians provide daily supervision over Defense Department equipment being used by the States until it is necessary to call a Guard unit to active duty for national purposes. There are approximately 45,000 Technicians nationwide. As stated in Report No. 1446 at page 1 of the Senate Committee on Armed Services:

> In authorizing Federal employee status for the National Guard technicians, the purpose of this legislation is –

(a) *To provide a retirement and fringe benefit program which will be both uniform and adequate;*

(b) To recognize the military requirements and the State characteristics of the National Guard by providing for certain statutory administrative authority at the State level with respect to the technician program;

(c) To clarify the technician's legal status which in certain areas has been the subject of conflicting court decisions, especially on the matter of whether technicians are covered under the Federal Tort Claims Act regarding third party actions against the U.S. Government. (Emphasis added)

(*See also Proprietors Ins. Co. v. U.S.*, 688 F.2d 687, 689, 9th Cir. 1982 and CR 148, p. 12).

D. THE CUSTOM.

In passing the Technician Act, Congress recognized that Guardsmen, by operation of mandatory retirement laws, may be forced out of the Guard and thereby lose the ability to serve as Technicians which affects their federal civil service retirement. To protect the Technician, the Armed Services Committee reviewing the National Guard Technicians Act of 1968 stated in Report No. 1446 at pp. 11-13:

> The Committee would make the following comments with respect to any involuntary retirement through the operation of the military personnel laws. Normally, under the Reserve Officer Personnel Act a lieutenant colonel or colonel is eliminated from an active status at about ages 53 and 55 respectively, since they will have completed 28 and 30 years of Reserve service. *Reserve officers who are technicians under normal circumstances would therefore lose their active National Guard membership and consequently be*

> *separated from their civilian technician job because of the requirement for a dual status.* Such person would therefore be retired within immediate civil service annuity under the involuntary separation process if they had completed 25 years of service or had reached age 50 and completed 20 years of service.
>
> The bill, however, contains a provision which will permit the Secretaries of the Army and the Air Force on a permissive basis to retain Reserve officers who are technicians in an active military status until age 60, *notwithstanding, the operation of the Reserve personnel laws which would eliminate them because of* promotion, passover or *length of service.* The committee made this provision permissive with the result that all Reserve technician officers could remain until age 60. It is the *intention* of the committee, that where the officer is fully qualified to hold his military position and properly performing his technician job, he should be retained in his technician employment. (Emphasis added)

In response to the early retirement problem and the statute, the NGB, with approval of the Secretaries of the Army and the Air Force, set up a program to protect Technicians who might otherwise be affected by military retirement laws. The policy decision was that any Technician hired prior to July 1, 1955, would be allowed to remain as a Technician until age sixty (60). These Technicians are known as "Grandfathers." Petitioners are not Grandfathers. All other Technicians would be allowed to remain in the Guard until age fifty-five (55) so as to obtain the maximum civil service retirement annuity, with a discretionary waiver to age sixty (60). (CR 152, p. 12; CR 151, pp. 25-26) Each petitioner was retired prior to age fifty-five (55).

The age fifty-five (55) policy was published in the National Guard regulations as early as 1968 (App. 57, infra). It has appeared in numerous regulations and policy letters to the Guard (CR 151, p. 19 and pp. 25-31). The age fifty-five (55) policy remains the custom of the National Guard Bureau concerning Technicians and it is routinely applied. (CR 152, p. 12; CR 149, p. 15; CR 24, pp. 27-31)

E. THE REGULATION, ANGR 36-06.

1. Vitalization.

In the mid-seventies, the NGB unilaterally conceived a new program whose purpose was to promote qualitative retention of Guard officers. The program has no statutory basis. The program is known as "Vitalization" and was published as a NGB regulation ANGR 36-06 in October, 1977.

The "Vitalization" concept is that after twenty (20) years of National Guard service, you will be retired unless recommended for retention by an appropriate board. (ANGR 36-05 ¶ 13a(10).) In arriving at a decision, the Board should evaluate, but is not limited to specific criteria, which includes, "Status with regard to Air Technician retirement eligibility." (ANGR 36-06 ¶ 10e.(4), App. 66).

The Boards reviewing petitioners found each of them to be the "most qualified" to continue in the Guard and their positions. (CR 43)

2. How Regulation was Adopted.

By law, National Guard Technician regulations *shall* be approved by the Secretary of Defense. Pub. L. 90-186, Sec. 10 (App. 84, infra). ANGR 36-06 was *not* approved by the Secretary of Defense. (CR 151, pp. 41-45)

There is a statutory procedure for the promulgation of Guard rules and regulations. 10 U.S.C. § 8012, § 8013, § 8033 and § 8034; 32 U.S.C. § 101. The record shows a draft version of ANGR 36-06 was written by the NGB. The NGB sent it to the appropriate officers in the Air Staff to review and approve prior to publication. The regulation was reviewed by the legal officer in the Air Staff. He commented concerning the regulation's purported impact on Technicians by stating:

> Para 3a indicates that officers retained beyond mandatory removal date by the Secretary of the Air Force will be considered for selective retention. Other provisions of the directive indicate that it is the Adjutant General of the State who determines whether an individual should be retained. *We question the desirability of permitting the Adjutant General of a State to reverse a decision of the Secretary of the Air Force.* (Emphasis added)

The regulation was returned to the NGB with this comment. The very problem brought to this Court was not corrected. The regulation was not returned to the Air Staff for approval after rewrite. (CR 154)

The regulation was not reviewed by the Air Reserve Forces Policy Committee on Air National Guard and Air Force Reserve Policy as required by 10 U.S.C. § 8033(a).

ANGR 36-06 provides no appellate review. If the Adjutant General of a state misinterprets its intent or

improperly applies the regulation, his decision is not reviewable.

F. MAJOR GENERAL COLLINS' ACTION.

The Board's findings that each petitioner was the "most qualified" were interpreted by MG Collins to be advisory in nature. Without authority or precedent, he chose to "involuntarily retire." (There are no other instances where an Adjutant General has overridden the decision of the ANGR 36-06 Board. CR 151, pp. 53-54 and p. 62.)

MG Collins acknowledged he did not take into consideration petitioners' employment as Technicians or their civil service performance files. (p. 51, Exhibit "I" to CR 24) Contrary to the regulation, appellants' civilian technician position had no bearing on MG Collins' decision. Quoting from MG Collins' deposition, p. 40 (CR 24):

A: The entire vitalization process was to give people the idea that they too could succeed in the National Guard. Success is qualifying for annuity as well as moving up through the ranks to reach whatever rank may be available.

Q: And the fact that he was serving as an Air Technician did not play any role in that decision at all?

A: No.

Q: You understood that once the decision was made not to vitalize him he would lose his position as Technician?

A: Yes.

There was a reason for each petitioner being "axed." It was because of petitioners' adherence to federal regulations requiring security of nuclear weapons. MG Collins has never challenged the fact that he had as a hidden agenda eliminating the "whistle-blowing" petitioners.

G. THE INCIDENT.

The "human reliability incident" has its genesis in the federal Human Reliability Program (HRP). The following is an outline of the program and the actions of the petitioners.

1. The Regulation.

Consistent with federal policy, the Air Force adopted a program to ensure the highest possible standards for reliability of personnel performing nuclear weapon duties. (The relevant rules covering the program in place during the actions of the petitioners are set forth in AFM 35-99, 16 May, 1974.) The underlying theory of the program is that an individual having day-to-day contact with personnel with access to nuclear weapons will immediately restrict that access for any unsafe reason. The rationale for such a program is readily apparent and has been the bulwark of this nation's nuclear weapon safety program for many years.

The structure of the program is that each unit with a nuclear responsibility must designate an "immediate commander" to implement the HRP. (¶ 1-3(g), AFM 35-99) Individuals who have been screened for access to nuclear systems (¶ 1-6, AFM 35-99) are monitored by the

"immediate commander" for their reliability for security and safety (¶ 1-9, AFM 35-99).

> Whenever the immediate commander has reason to question the reliability of an individual identified under the HRP, he should immediately remove the individual from duties involving nuclear weapons. (¶ 1-9(c), AFM 35-99)

2. Petitioners' Actions.

The command at issue in this case was the Air Defense Command (ADC), which had responsibility for control of nuclear weapons given to State Guard units. In Guard units, the HRP was administered by Air National Guard Technicians. The designated Technician "immediate commander" of the 116 Fighter Intercept Squadron was petitioner Richard Main.

As a designated "immediate commander," petitioner Main monitored approximately 40 officer aircrews. During 1973, two WANG officers began to experience significant disciplinary problems. The disciplinary problems plus reports of their possible drug involvement caused Mr. Main to remove these officers temporarily from nuclear access on January 11, 1974.

As was his obligation, Mr. Main prepared the appropriate notifications required by the Regulation for WANG to forward to ADC. For reasons that have never been explained, the State Guard did not forward the notice to ADC. Rather, the office of the State Adjutant General intervened as a champion for the two officers. Efforts were made by State Headquarters to have LTC Main as a Guard Officer change his mind. LTC Main felt this would be a dereliction of duty and refused.

3. WANG's Response.

On February 1, 1974, LTC Main's Guard Squadron Commander was replaced by LTC Robert Collins, who had previously been assigned to State Headquarters. LTC Collins was assigned specifically to have the removed officers reinstated. LTC Collins gave LTC Main an order in his Guard capacity to put the two officers back on flight duty. When this was declined, LTC Collins signed an order replacing Main as the HRP "immediate commander" and assigned himself as the "immediate commander."

ADC, without knowledge of the temporary disqualification of the officers, countermanded LTC Collins' action assigning himself as "immediate commander" because he was not a Technician.

The State Guard then issued orders putting the officers back on flight duty with make-up time for lost flight hours. The investigative procedure required by the HRP regulation (AFM 35-99) was not followed.

During the State efforts to have the officers put back on nuclear access, ADC was not notified of the disqualifications. Fortuitously, an ADC Inspector General (IG) happened to be at Spokane International Airport on a visit. He met with LTC Main and his assistant LTC Christoffersen on March 22, 1974. This officer immediately recognized the effort by Washington State Headquarters to improperly act concerning nuclear weapons.

The IG returned to ADC on Saturday, March 23, 1974. On Sunday, March 24, 1974, all nuclear weapons within the State of Washington were "locked up" and removed

from WANG control. On Monday, March 25, 1974, an ADC investigator was sent to WANG Headquarters. His adverse findings concerning the actions of WANG were reported to ADC. On April 20, 1974, ADC ordered that all nuclear missions be removed from State Guard units *nationwide*. To state the obvious, this caused much embarrassment to WANG and to LTC Collins, as they were the precipitating cause of loss of an important and visible National Guard mission.

4. Political Retaliation.

In violation of the HRP (AFM 35-99), two Board investigations were ordered by State Headquarters concerning the actions of Mr. Main and Mr. Christoffersen. The Board sustained Mr. Main and Mr. Christoffersen. Your petitioner, John Warn, sat on the Board supporting Mr. Main and Mr. Christoffersen.

The unit's previous commander not only supported LTC Main and LTC Christoffersen, but gave them outstanding ratings. These ratings were then downgraded by the reviewing superiors. The commander who supported Mr. Main and Mr. Christoffersen is your petitioner, William Gibson.

In April, 1978, when it became clear LTC Collins would get a promotion to Adjutant General under the new administration of Governor Ray, he told Mr. Main he was going to get rid of anyone who did not work with him. He was not discreet and repeated this threat concerning petitioners in the presence of a flying companion. (CR 80, ER 60-62)

In June, 1978, Governor Ray did appoint LTC Collins as State Adjutant General. In July, 1978, the now MG Collins convened the first ANGR 36-06 Board in Washington. Despite the favorable Board action, MG Collins, without stated reason, overrode the Board and directed termination of each petitioner from the Guard. Automatically, each plaintiff lost his Technician's job for failure to maintain status as a Guardsman.

5. Effect of Action on the Petitioners.

Petitioner Alfred P. Christoffersen was terminated from his position as a Technician after 18 years of federal civil service and two years short of his eligibility for lifetime civil service retirement benefits. He was a Lieutenant Colonel and serving as a GS-12 Navigator in the Technician program. Petitioner Richard F. Main was terminated from his Technician position two and one-half years short of his eligibility for lifetime benefits. He was a Lieutenant Colonel and a GS-13 Flight Instructor in the Technician program.

Petitioners William J. Gibson and John R. Warn were terminated from their positions as Technicians and did quality for a minimum retirement benefit. However, their potential retirement payment was appreciably diminished from the amount they would have received if permitted to serve to the allowed age of fifty-five (55). Warn was a Lieutenant Colonel and a GS-13 Chief of Support Services as a Technician. Gibson was a Colonel and GS-13 Chief of Air Operations as a Technician.

6. National Significance.

The bifurcated nature of a Technician's position requires responsiveness to both federal and state superiors. However, in creating the position of Technician, it could never have been a Congressional intent to allow state patronage positions, such as an Adjutant General, to be used to carry out a personal and vindictive agenda in violation of basic civil rights. The necessary autonomy of Technicians nationwide is threatened when a State Adjutant General can ruin one's civil service career by making a non-reviewable decision. This is not an ephemeral concern. At stake here is the integrity of the Technician program.

Technicians are to protect and ensure the availability of federal defense equipment in the hands of State Guards. It is vital that they do not fear "blowing the whistle" on unsafe practices involving national safety and defense. To allow the Ninth Circuit's ruling to stand will raise the question, "Will the federal Technician faithfully execute his/her duties because of fear of stepping on the wrong state actor's toes?" Political fortunes change. Technicians will have no way knowing if the State guard officer they must rebuke today will be the Adjutant General tomorrow.

H. FEDERAL JURISDICTION.

Petitioners initially sought relief in the U.S. Court of Claims under 28 U.S.C. § 1491. The Court of Claims found no jurisdiction because the petitioners were not in active federal service.

Petitioners were thus obliged to seek relief in a court that had jurisdiction over both the "state" actors and the "federal" actors. 42 U.S.C. § 1983 provides the jurisdictional basis to challenge MG Collins' action as a State actor while likewise joining the federal government as a desirable party both to interpret this far-reaching regulation and provide relief to petitioners as Technicians.

REASONS FOR GRANTING CERTIORARI

A. CONFLICT AMONG THE NATION'S LOWER COURTS.

1. The Ruling in Bollen v. National Guard Bureau. 449 F. Supp. 343 (1978).

When Technician issues arise, they are often in the context of a retaliatory act. In *Bollen, supra,* an officer in the Pennsylvania National Guard was reviewed by an ANGR 36-06 Vitalization Board and *not* recommended for retention. The Court found that the reason for his termination from the Guard (and consequently his Technician's position) was due to an exercise of his First Amendment rights. The court allowed a trial and made a conclusion that a claim existed because:

> As the Supreme Court said in *Roth* and *Sindeorman,* before a property right can be taken, due process must be afforded. Due process, of course, is an elastic concept, *Cafeteria and Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L.Ed.2d 1230 (1961), but clearly a proceeding pursuant to ANGR 36-06 falls far short of that required. *Id.* at 350.

The decision is by a District Court, but it was not challenged on appeal by the critical defendant, the

National Guard Bureau. Like *Bollen,* petitioners were exercising their First Amendment Right to speak out and were punished. However, in its opinion below, the Ninth Circuit has approved the procedure that denies due process that was successfully challenged in the Third Circuit.

The court in *Bollen, supra,* determined that the evaluation of the civil rights claims must be weighed against the test of military-type claims as set forth in *Mindes v. Seaman,* 453 F.2d 197 (5th Cir., 1971). The Ninth Circuit adopted the same test in its decision. However, on review, the Ninth Circuit found application of the *Mindes v. Seaman* test precluded review even though more egregious facts exist in this case.

The test of *Mindes v. Seaman* is a two-step process to evaluate the justicability of a challenge to a military decision. First, the Court must find an allegation of deprivation of a recognized constitutional right and exhaustion of intraservice remedies. Second, the Court balances four factors to determine if review is appropriate.

The Ninth Circuit found petitioners met the first step, but on balance of the second step, review was not warranted. Clearly, the lower courts need guidance on the applicability of the *Mindes v. Seaman* test to the claims of State Guardsmen and if it is applicable what is the scope of the tests' criteria. This is an important federal question addressed by various states, but not by this Court. It should be addressed.

2. Conflict with the Court of Claims.

In applying the *Mindes v. Seaman* test, the Ninth Circuit Court's view on exhaustion is not clear. The opinion suggests that petitioners may find partial relief in the Board for Correction of Military Records. If so, the Court misapprehends the role of the Board. The Board can review and correct military records to reflect credible service in the recognized Guard. 10 U.S.C. § 1552. However, the Board cannot rule on MG Collins' arbitrary reversal of the retention Board's decision, and certainly the Board has no authority over Technician civil servants.

The conflict in decisions arises because any challenge to a Board ruling would be before the United States Claims Court. 28 U.S.C. § 1491. The Court of Claims has ruled concerning your petitioners in *Christoffersen v. U.S.*, 230 Ct. Cl. 998, 1004 (1982) App. 55, infra, that:

> In the final analysis, there is no theory available to plaintiffs which would permit recovery in this court consistent with our holding in *Gnagy*. As in *Gnagy*, plaintiffs were terminated from their technician positions due to the loss of their military positions in the NG. Such termination was mandated by statute. 32 U.S.C. § 709(e)(1). Any claim of illegality resulting from plaintiffs' termination, therefore, must by necessity turn on plaintiffs' loss of their military NG positions. Since we have previously stated that a military member of the NG, not in active federal service, is a state employee, plaintiffs have no basis for recovery of monetary damages against the United States in these circumstances. Even if it can be shown that plaintiffs' dismissal from the NG was improper, such an action would not properly be before this court.

If the Court of Claims as the reviewing court has no power to grant relief, certainly the lower administrative

tribunal lacks such power. To the extent the Ninth Circuit Court relies upon the Board for Correction of Military Records as a possible avenue of relief in applying the *Mindes v. Seaman* test such conclusion is in error and conflicts with the Court of Claims ruling.

3. Conflict with its Ruling in Sebra v. Neville, 801 F.2d 1135 (9th Cir., 1986).

The Ninth Circuit observed in *Sebra v. Neville, supra* at 1140, that "military decisions made for "non-military reasons" are subject to Court review. The case also acknowledged that it would review discharge cases. (At 1141 relying upon its opinion *Muhammad v. Sec. of Army,* 770 F.2d 1494, 1495 (9th Cir. 1985) The case involved a transfer decision that the Court chose not to review but re-dedicated itself to the above guiding principles. These principles were not followed in petitioners' case.

Although Circuit decisions can often be resolved by a hearing en banc, petitioners' request for such a hearing was denied.

B. SIGNIFICANT ERROR HAS OCCURRED WHICH REQUIRES CORRECTION.

1. The Court Decision Challenges the Integrity of the Technician's Program.

Technicians provide the bulwark of day-to-day supervision over U.S. Defense equipment while in the control of State Guard units. Knowledge that a State Adjutant General can terminate your livelihood at the stroke of a pen and without an appeal, will give every Technician pause before acting. Technicians must enforce

federal regulations, but if doing the right thing means your job, very few people will "measure up." The decisions of a Technician become more important the more senior the Technician. The Senior Technician is the most vulnerable Technician, since one will not want to rock the boat so he/she can qualify for the pension at age fifty-five (55).

. Failure to provide for an appeal mechanism or some type of due process of an Adjutant General's decision in this personnel area will only foster further abuse by State Adjutant Generals.

2. No Trial on the Merits has been Allowed.

It is an axiom of the American judicial system that every man is entitled to his day in Court. Petitioners' claims have been resolved by summary judgment. They have never had a hearing on the facts. The Circuit Court made assumptions about the nature and reason of MG Collins' actions and the viability of the regulation without a record. Petitioners have long felt they have a claim in search of a courtroom because:

- The State National Guard has no remedy.

- The regulation (ANGR 36-06) purports that there is no remedy.

- A Technician who loses guard status must be terminated from the civil service. *Tennessee v. Dunlap*, 426 U.S. 312 (1976).

- The Court of Claims says there is no channel to review the claims of non-activated Guardsmen.

- The District Court ruled petitioners' claims are barred because of this Court's ruling in *Chappell v. Wallace*, 462 U.S. 296 (1983).

- The Ninth Circuit held the claims are not barred by *Chappell v. Wallace*, but are military in nature and should not be disturbed because of the *Mindes v. Seaman* doctrine.

If this pattern of decisions stands, all Technicians nationwide now face the intolerable choice between following federal regulations and losing their job, or knuckle under to political appointees who wish to run National Guard units for their own personal purposes. This is simply not the due process required for our valued federal employees and allowed by the Fifth and Fourteenth Amendments. The reviewing Courts have departed from the accepted and usual course of judicial proceedings.

3. The Decision Defeats the Very Purpose of Public Service.

This Country expects and must demand the highest quality in its public servants. A system that not only tolerates, but fosters, "yes men" is an anathema to our system of government and justice.

4. The Court's Ruling Supports an Invalid Regulation.

Sufficient evidence was presented at the time of the motion for summary judgment to challenge the adoption of the regulation. By refusing trial on this issue, the Court is allowing a facially unapproved regulation to be

enforced. The regulation's effect is in excess of its authority and void. *Stark v. Wickard*, 321 U.S. 288 (1943). The reviewing Courts, by not recognizing this problem, have departed from the accepted and usual course of judicial proceedings.

RELIEF

The Court is asked to reverse the District Court's and the Ninth Circuit's decision and grant summary judgment on the invalidity of ANGR 36-06. In the alternative, the Court is asked to grant certiorari for the reasons set forth in this Petition.

DATED this 13th day of March, 1989.

Respectfully Submitted,

CHARLES MATTHEW ANDERSEN
WINSTON & CASHATT
Attorneys for Petitioners

APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALFRED P. CHRISTOFFERSEN, et al.,	NO. C-81-572-JLQ
Plaintiffs	MEMORANDUM OPINION DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT
vs.	
WASHINGTON STATE AIR NATIONAL GUARD, et al.,	
Defendants	

(Filed March 21, 1984)

THIS MATTER came on regularly for hearing on plaintiffs' Renewed Motion for Partial Summary Judgment, defendants' Renewed Motion for Summary Judgment and defendants' Motion to Dismiss the Second Amended Complaint. Plaintiffs were represented by Charles Matthew Anderson [sic]; defendants were represented by Robert C. Hargreaves.

Plaintiffs are four (4) former Air National Guard officers who also held civilian positions as technicians. National Guard membership is a condition of employment for technicians due to 32 U.S.C. § 709(b). Each plaintiff had extensive military service. Warn and Gibson had twenty (20) years of qualifying service for miltary [sic] retirement pay, Christofferson eighteen years, and Main had over seventeen years of qualifying service.

Plaintiffs Main and Christoffersen were not eligible for a pension; the terminations of plaintiffs Warn and Gibson reduced their pensions. Defendant apparently does not dispute plaintiffs' contention that each plaintiff has performed satisfactorily.

Air National Guard Regulation ANGR 36-06 (ANGR 36-06) requires that all Air National Guard commissioned officers and warrant officers with over twenty (20) years of qualifying service shall be reviewed annually for consideration of retention or separation. ANGR 36-06 ¶2. The regulation's purpose is to ensure maintenance of combat readiness with a maturing force. This concept is referred to as vitalization.

An advisory vitalization board makes a recommendation to the state Adjutant General (A.G.) concerning retention, although ANGR 36-06 provides that this recommendation does not bind the A.G. The status of each of the four plaintiffs was reviewed by the vitalization board. Despite a recommendation that each plaintiff should be retained, the defendant A.G., Robert Collins, decided against retention of plaintiffs in August, 1978 and so informed each plaintiff. The separation from Guard status resulted in plaintiffs losing their civilian technician positions.

Plaintiffs originally commenced suit in the Court of Claims, however, that case was dismissed based upon the determination that A.G. Collins was a "state" actor and that plaintiffs' other claims were foreclosed by existing Court of Claims precedent.

Plaintiff commenced suit in this court seeking reinstatement, backpay, grade and pay advancement, an award of damages for deprivation of civil rights, and a

finding that ANGR 36-06 is a nullity. 42 U.S.C. § 1983 is cited as a basis of jurisdiction for the damage claims. Plaintiff's Second Amended Complaint, which raised the issue of whether ANGR 36-06 was properly promulgated, cited 28 U.S.C. § 1343, 28 U.S.C. § 1331; 42 U.S.C. § 1983; the First, Fifth, and Fourteenth Amendments to the Constitution, and "the court's inherent judicial authority to preserve the legislative scheme created to organize the uniformed services", as the jurisdictional statement.

Plaintiffs' § 1983 claim encompasses several theories, substantive and procedural. Substantively, plaintiffs contend that the actions of A.G. Collins were arbitrary and vindictive; that Collins' actions were inconsistent with ANGR 36-06; and that Collins utilized his own criteria, not those set out in ANGR 36-06. Plaintiff's final substantive challenge is that the change in National Guard status was due to the exercise of plaintiffs' First Amendment rights. The procedural challenges raised by plaintiff are that technicians are not subject to the vitalization policy due to 32 U.S.C. § 709; that there is no statutory authority for promulgation of ANGR 36-06; that plaintiffs had no effective appeal rights from the non-retention decision; and that ANGR 36-06 violates the plaintiffs' rights to equal protection. Plaintiffs also attack the validity of ANGR 36-06 on the grounds that it was not prescribed by the Secretary of the Air Force nor approved by the Secretary of Defense as required by 32 U.S.C. § 709 (notes/uncodified).

Recent opinions of the Ninth Circuit and the Supreme Court have reinforced the inappropriateness of judicial interference in military affairs. "Orderly government requires that the judiciary be as scrupulous not to

interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Chappell v. Wallace*, ___ U.S. ___, 103 S.Ct. 2362, 2366 (1983), quoting *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

> The special nature of military life, the need for unhesitating and decisive action by military officers and equally determined responses by enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability of those they are charged to command.

Chappell, 103 S.Ct. at 2367.

Plaintiffs attempt to distinguish *Chappell* on the ground that in this case there was no alternative military remedy available to plaintiffs as was present in *Chappell*. Plaintiffs' argument is foreclosed by *Mollnow v. Carlton*, 716 F.2d 627, 630 (9th Cir. 1983), which stated "[w]e find no room in *Chappell* to consider the adequacy of the intraservice remedy." *Chappell* clearly stands for the principle that a suit for damages against a military superior is foreclosed, thus, Collins has no personal liability.

Assuming, *arguendo*, that plaintiffs' action is not totally foreclosed by the principles enunciated in *Chappell v. Wallace, supra*, the court concludes the application of the factors set forth in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) precludes review of this matter of internal military affairs.[1] *Mindes* allows judicial review of internal military affairs only where there are allegations of

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[1] The Ninth Circuit has issued at least three opinions subsequent to the *Chappell* decision which have applied the *Mindes v. Seaman* principles. *Watkins v. United States Army*, 721 F.2d 687 (1983) and *Helm v. State of Cal.*, No. 82-4613 (December 20, 1983); and *Gonzalez v. Department of Army, supra*.

deprivations of constitutional rights or that the military has acted in contravention of its own statutes or regulations. The factors are: (1) the nature and strength of the claim; (2) the potential injury to plaintiff if review is refused; (3) the extent of interference with military functions; (4) the extent to which military discretion or expertise is involved. *Gonzalez v. Department of Army*, 718 F.2d 926, 930 (9th Cir. 1983). A prerequisite to the application of the *Mindes* factors is that plaintiff must sufficiently allege a violation of a recognized constitutional right, a federal statute or military regulation. *Gonzalez v. Department of Army*, 718 F.2d 926, 929 n.5 (9th Cir. 1983), citing *Wallace v. Chappell*, 661 F.2d 729, 733-34 & n.5 (9th Cir. 1981), *rev'd on other grounds*, ___ U.S. ___, 103 S.Ct. 2362 (1983).

Plaintiffs have asserted that their separation from National Guard status was due to A.G. Collins' alleged desire to make room for individuals more politically acceptable to former Governor Ray. The court allowed plaintiffs to depose former Governor Ray in an effort to establish a factual basis for the patronage claim. Plaintiffs now admit the absence of a factual basis for this claim.[2] Plaintiffs' additional First Amendment challenge is that the terminations were reprisals for embarrassment caused to A.G. Collins which resulted from the "Human Reliability Incident". Briefly stated, plaintiffs Christoffersen and Main reported what they believed to be erratic behavior by two subordinates to NORAD as well as suspending these individuals from nuclear access. Defendant Collins, then a Lieutenant Colonel, attempted

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[2] C.R. 102 at 10.

to rescind the suspensions by replacing plaintiff Warn as the officer in charge of the Human Reliability Program. The ultimate result was the permanent disqualification of the two individuals and the removal of nuclear capability by the Air Guard.[3] Subsequently, Collins was appointed as A.G. of the Washington Air National Guard, and Collins' decision not to retain plaintiffs followed immediately. The First Amendment claims of plaintiffs Warn and Gibson are cloudy, although Gibson's claim was that he was separated for being too SAC oriented. Plaintiff Warn's First Amendment claim involved only the unsupported allegations of political patronage which plaintiff Warn now admits had no factual basis. In sum, the alleged constitutional violations are tenuous.

The presence of a possible constitutional violation does not end the analysis. The four *Mindes* factors must be applied to this case. The court, while not unsympathetic to plaintiffs' claims, concludes that it would be inappropriate to intervene in this area of military affairs. I recognize that the potential injury plaintiffs face if the decision is not reviewed is substantial; the respective plaintiffs will receive no pension or a reduced pension as a result of their separation despite lengthy and satisfactory job performance.

However, judicial interference with the decisions against retention of plaintiffs is precisely the type of interference in military matters which should be avoided. As was stated in *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) "[j]udges are not given the task of running the Army". The court cannot agree with plaintiffs' contention

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[3] C.R. 24, Ex. C at 6-8.

that the interference which would entail from this court reviewing this matter of internal military affairs is minimal. Such a review would necessarily require this court to determine which subordinates a commander must rely upon. Military expertise is obviously implicated whenever a decision is made not to retain military personnel and this court is unwilling to venture into this area.

Plaintiffs' contention that 32 U.S.C. § 709 prevents removal of a civilian technician does not withstand scrutiny. The crux of plaintiffs' argument is that in light of the legislative history of 32 U.S.C. § 709, technicians are exempt from nonretention due to passover or length of service.[4]

The cited legislative history permits the Secretary of the Army and Air Force to retain officers despite Reserve personnel laws; it does not compel retention. ANGR 36.05,[5] the efficacy of which is unchallenged here, governs administrative discharges of officers. The pertinent

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[4] S. Rep. No. 1446, 90th Cong. 2d Sess. 12 (1968):

> The bill, however, contains a provision which will permit the Secretaries of the Army and the Air Force on a permissive basis to retain Reserve officers who are technicians in an active military status until age 60, notwithstanding the operation of the Reserve personnel laws which would eliminate them because of promotion passover or length of service. The committee made this provision permissive with the result that all reserve technician officers could remain until age 60. It is the intention of the committee, that where the officer is fully qualified to hold his military position and properly performing his technician job, he should be retained in his technician employment.

[5] Ct. Rec. 20, Appendix A.

subparts of ANGR 36.05 which are dispositive of plaintiffs' arguments are ¶3(c), Table 1, ¶13a(6) and 13b(7). Paragraph 3(c) defines a policy against nonconsensual discharges for those not qualified for retirement or an annuity in limited instances. ¶3(c) refers to Table 1, and Rule 3 of Table 1 is applicable to plaintiffs. Pursuant to that rule, only discharges for reasons set out in ¶ 13a(6) (mandatory promotion, no position available) and ¶14b(7) (maximum years of service or maximum years in grate) must be consensual. The basis of plaintiffs' nonretention was ¶13a(10), thus, plaintiffs could be involuntarily retired prior to age 55. By reason of the foregoing, the defendants' Motion for Summary Judgment on plaintiffs' § 1983 claims must be granted.

Plaintiffs' claims of procedural due process violations are actionable only if plaintiffs have a property right or a legitimate claim of entitlement. A legitimate claim of entitlement must be derived from an independent source in state or federal law. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). A legitimate claim of entitlement may be based upon conduct or representations of government officials which create a mutually explicit understanding. *Doran v. Houle,* Nos. 82-3445, 82-3457, and 82-3465 (9th Cir. Nov. 18, 1983); *Orloff v. Cleland,* 708 F.2d 372, 377 (9th Cir. 1983).

The court finds plaintiffs have no property right or legitimate expectancy in continued military status. *Walker v. Alexander,* 569 F.2d 291 (5th Cir. 1978), *Fredricks v. Vartanian,* 529 F.Supp. 264, 267 (D. Mass. 1981); *aff'd,* 694

F.2d 891 (1st Cir. 1982). The legislative history cited by plaintiffs[6] refers only to "grandfather" technicians and plaintiffs admit they are not included in this category.[7] The only possible basis for plaintiffs' entitlement claim is the Greenlief correspondence, dated April 12, 1973.[8] This court disagrees with the analysis and result in *Bollen v. National Guard Bureau*, 449 F.Supp. 343 (W.D. Pa. 1978). Plaintiffs' equal protection claim is without merit. Plaintiffs contend that the statutory scheme requires uniformity in National Guard regulations and that as the Air National Guard regulations were not identical to the Army, an equal protection violation existed. Ct. Rec. 48 at 11-14. The regulations in question were identical until December 31, 1979. Ct. Rec. 66 at 2. Defendants are also entitled to Summary Judgment on these claims.

Defendants have moved to dismiss the Second Amended Complaint on the grounds of lack of subject matter jurisdiction, lack of personal jurisdiction over the defendants, the Eleventh Amendment and sovereign immunity, a failure to state a claim upon which relief may be granted, and the failure to join federal parties.[9] The court is satisfied the Eleventh Amendment does not bar prospective injunctive relief against the state for a violation of federal law. *Pennhurst State School & Hospital v. Halderman*, 52 U.S.L.W. 4155, 4159 (January 23, 1984).

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6 Ct. Rec. 48 at 12.

7 Ct. Rec. 112 at 25.

8 Ct. Rec. 110, Ex. 2.

9 Ct. Rec. 93. Defendant also asserted official immunity on behalf of defendant Collins, however, this issue is moot in light of *Chappell v. Wallace, supra*. Defendants' contention as to lack of personal jurisdiction is included in the sovereign immunity challenge. Ct. Rec. 94 at 6 n.5.

Defendant contends the Second Amended Complaint does not sufficiently state a jurisdictional basis for the challenge to ANGR 36-06. As defendants had requested and were granted a stay as to further discovery as to the validity of ANGR 36-06, plaintiffs' pleadings as to the validity of the challenged regulation were based upon information and belief. If there was no statutory authority for ANGR 36-06, or if it was not properly promulgated the regulation, of course, would be invalid, as would be any action taken pursuant to the invalid regulation. This court has the power to determine whether an agency has exceeded its statutory authority. *Stark v. Wickard*, 321 U.S. 288, 310 (1943). Defendants' contention that this action should be dismissed for failing to state a claim is without merit. Although defendant Collins may not be held liable due to *Chappell v. Wallace, supra*, injunctive relief is possible as to the state. Further, the federal defendants could provide the requested relief if plaintiffs successfully challenge the promulgation of the regulation or it is determined no statutory authority existed for ANGR 36-06.

Defendants have moved to dismiss the Second Amended Complaint based upon the failure to join certain federal parties as defendants. An application of Fed.R.Civ.P. 19, as discussed in *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982) and *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042-44 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 156 (1983) requires joinder of the federal defendants to ensure that the federal government's interests are protected. The government's interests in a uniform manning policy would be seriously undermined if it was determined that ANGR 36-06 was improperly promulgated. The court concludes

that the federal parties should be joined, if feasible, pursuant to Fed.R.Civ.P. 19(a).

Step 2 of the joinder analysis requires the application of four factors to determine whether the action should go on without the absent party. ANGR 36-06 is national in scope; it is applicable in all fifty states. Regardless of the ultimate outcome of the challenge to the regulation's efficacy, similar challenges may be expected. Additionally, the interests of the state in upholding the regulation are not identical; the potential liability of the state defendants is much narrower in light of the Eleventh Amendment. As the federal actors promulgated ANGR 36-06, the state parties would not be able to provide plaintiffs the entire relief sought.

It should be noted that the current status of the litigation is markedly different than that prevailing when defendants' initial Motion to Dismiss was denied. At that time, the predominant theme of plaintiffs' claim was § 1983. Plaintiffs' § 1983 claims have been disposed of by this Opinion, thus, plaintiffs' remaining challenge is to the efficacy of ANGR 36-06.

Based upon the foregoing IT IS HEREBY ORDERED as follows:

1. Plaintiffs' Motion for Partial Summary Judgment is DENIED.

2. Defendants' Motion for Summary Judgment on plaintiffs' § 1983 and constitutional claims is GRANTED.

3. Defendants' Motion to Dismiss the Second Amended Complaint is DENIED.

4. Plaintiff if directed to join the necessary federal parties as defendants on plaintiffs' claims as to the efficacy of ANGR 36-06. FAILURE TO JOIN SUCH DEFENDANTS WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS ORDER SHALL RESULT IN DISMISSAL OF THIS ACTION.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 21st day of March, 1984.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
United States District Judge

APPENDIX 2

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ALFRED P. CHRISTOFFERSON, et al., Plaintiffs, vs. THE WASHINGTON STATE AIR NATIONAL GUARD, et al., Defendants.	NO. C-81-572-JLQ ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (Filed October 11, 1985)

Plaintiffs are four former Air National Guard officers who also held civilian positions as technicians. Each plaintiff had extensive military service which was performed satisfactorily. At the crux of this action is Air National Guard Regulation ANGR 36-06 (ANGR 36-06) which mandates Air National Guard officers with over twenty years qualifying service be reviewed annually for consideration of retention. Known as the "vitalization" concept, the policy underlying ANGR 36-06 is to ensure maintenance of combat readiness with a maturing force. Under the regulation, an advisory vitalization board makes a non-binding recommendation to the State Adjutant General (A. G.). Despite a recommendation for rentention the defendant A. G. Collins directed separation from Guard status which necessarily resulted in loss of plaintiffs' civilian technician positions. There have been no other instances where an A. G. has overriden [sic] the decision of the vitalization board to involuntarily non-retain officers.

In this Court's previous Memorandum and Order, Ct. Rec. 113, all issues except the validity of ANGR 36-06, were addressed following extensive discovery, briefing, and argument, and were resolved in favor of defendants. This last question is now before the court on cross-motions for summary judgment. Plaintiffs contend ANGR 36-06 has no legal basis and was not properly promulgated under the relevant statutory or regulatory procedure.

The facts are undisputed:

Air National Guard regulations affecting personnel matters are prepared within the Air Directorate of the National Guard Bureau (Military Personnel Policy Branch, Manpower & Personnel Division) by the office of primary responsibility (OPR). These regulations are "co-ordinated" within the Bureau. Once internal co-ordination has been secured, the draft is sent by the Air Directorate through the Chief, National Guard Bureau, to the Bureau's Office of Administrative Services (NGB-DAE).

NGB-DAE then forwards the draft to Headquarters United States Air Force (HQ USAF) OPR, based upon subject matter. The HQ USAF OPR replies to NGB-DAE, generally by letter, in one of four ways: (1) concurring without comment; (2) nonconcurring with stated reasons; (3) concurring with comments and/or proposed revisions, or (4) requesting specific changes be made and resubmitted for concurrence.

If HQ USAF OPR nonconcurs, such nonconcurrence is expressed in the reply letter. Then negotiation is conducted and a second letter would be obtained evidencing concurrence to the revised draft. Concurrence by HQ

USAF OPR signifies approval of the Air Force Chief of Staff.

After the required concurrence is received, NGB-DAE prepares a Request for Issuance of Publication, memorializing the administrative requirements for issuance. This form is signed by the Chief of the National Guard Bureau thus signifying approval of the administrative processing and authorizing publication. The regulation is then published by HQ USAF effective on the date specified by the cover page of the published document. All ANG regulations are authorized for publication by order of the Secretary of the Air Force. Before this formal coordination and concurrence is sought, extensive informal discussions have usually led to an informal concurrence.

As described, a draft of ANGR 36-06 was submitted to HQ USAF OPR for comments and/or concurrence to be returned no later than August 5, 1977. On August 2, 1977, Lieutenant Colonel Donald Post, operating as the Chief of Separation & Retirement Branch of the Personnel & Plans Directorate in the Air Staff, replied by letter as follows:

> We have reviewed the draft manuscript of proposed ANGR 36-06 attached to subject letter and offer the following comments . . .
>
> a. . . . Since the proceedings or results of the board should not be divulged, an oath administered by the president of the board to the Recorder would also be appropriate.
>
> b. [use the term "Advisory Board" only rather than referring to "Selective Retention Board" in some instances.]

In addition, on August 4, 1977, Mr. Hopson [sic], on the legal staff of the Chief's office, replied in writing to NGB-DAE:

> The proposed revisions of the referenced directive have been reviewed and the following comments are submitted . . .
>
> [Eight items including:]
>
> . . .
>
> b. . . . [I]t is the Adjutant General of the State who determines whether an individual should be retained. We question the desirability of permitting the Adjutant General of a state to reverse a decision of the Secretary of the Air Force.
>
> . . .

On August 17, 1977, Chief, NGB, Major General LaVern E. Weber signed the publication authorization form with issuance of the regulation effective October 7, 1977. As such, it superceded a prior version of the regulation dated January 26, 1976, and continued until it was reissued, effective January 1, 1984, under the designation ANGR 35-06.[1]

Statutory Authority

Plaintiffs contend the promulgation of ANGR 36-05, the enabling regulation for ANGR 36-06, as well as ANGR 36-06 itself, was beyond the authority of the NGB.

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[1] ANGR 35-06, unlike the challenged regulation, provides for an appellate mechanism and review. It is undisputed the new regulation was promulgated because of the concern by the Secretary of the Air Force about litigation and the fact an appeal existed for enlisted persons but not for officers.

It is urged there is no statutory basis for "vitalization." Instead, claim plaintiffs, Congress specifically legislated with respect to mandatory retirement of officers in the Untied [sic] States Reserve by way of the Reserve Officer Personnel Act of 1954 (ROPA). 68 Stat. 1147. Congress, it is argued, clearly legislated in 10 U.S.C. § 8848(c) and § 8851(c)[2] that civil technicians may not be removed from

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[2] 10 USC § 8848(c) provides:

> Notwithstanding subsections (a) and (b) of this section, the Secretary of the Air Force may authorize the retention in an active status until age 60 of any officer of the Air National Guard of the United States who would otherwise be removed from an active status under this section and who is employed as a technician under section 709 of Title 32, United States Code [32 USC § 709], in a position for which Air Natinoal [sic] Guard membership is prescribed by the Secretary. (Amended December 12, 1980, P.L. 96-513, 94 Stat. 2935 to delete "United States Code" after "title 32" and "of this section" following "(b)").

10 USC § 8851(c) provides:

> Notwithstanding subsections (a) and (b) of this section, the Secretary of the the [sic] Air Force may authorize the retention in an active status until age 60 of any officer of the Air National Guard of the United States who would otherwise be removed from an active status under this section and who is employed as a technician under section 709 of Title 32, United States Code [32 USCS § 709], in a position for which Air National Guard membership is prescribed by the Secretary. (Amended 1980 and 1984, to delete, respectively "United States Code" after "title 32" and "of this section" following "(b)".)

service until age 60. Thus, the argument goes, ANGR 36-06 is without force and effect because it is contrary to specifically manifested congressional intent. See *Boske v. Comingore*, 177 U.S. 459 (1900); *Edwards v. Madigan*, 281 F.2d 73 (9th Cir. 1960) (military regulations are presumptively valid unless arbitrary or unreasonable or plainly inconsistent with the law). However, this court has previously ruled that Sections 8848(c) and 8851(c) are not mandatory. Ct. Rec. 113 at 8 and note 4. While the legislative history reveals the committee's intention that fully qualified technicians "should" be retained, S. Rep. No. 1446, 90th Cong. 2d Sess. 12 (1968), the unambiguous language of the relevant statutes make retention permissive.[3] See note 2. Nor have counsel otherwise cited statutory language or legislative history which would lead to the conclusion that Congress, by implication, intended to reserve this entire area of military retirement rulemaking to itself.

Approval by Secretary of Defense.

Next, plaintiffs question the validity of the regulation because the Secretary of Defense did not approve ANGR 36-06. Reliance is placed upon Sec. 10 of the National Guard Technicians Act (NGTA) of 1968, P. L. 90-486, 82 Stat. 760 which provides:

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[3] To be distinguished is the legislative history discussing those reserve officers who were "grandfathered" into retention by reason of civilian employment before July 1, 1955. See 1955 U.S. Code & Cong. Admin. News at 2255-2256. Plaintiffs are not within the grandfathered class.

> Regulations prescribed by the Secretary of the Army and Secretary of the Air Force *under this Act* shall be approved by the Secretary of Defense and shall, so far as practicable, be uniform.

Emphasis added.

Defendants counter that ANGR 36-06 is not a "technicians" regulation and that despite the fact it can affect technicians, the same may be said of any NGB regulation. Instead, argue defendants, the challenged promulgation is a "military" officer "personnel" regulation. As such, the Secretary of Defense need not approve it.

The court agrees that ANGR 36-06 must be characterized as a military personnel regulation rather than a technician regulation. It is true that invocation of the rule to separate Guard Officers can impact a federally recognized technician, since the latter status is dependent upon the former. 32 U.S.C. § 709(e)(1). However, the class of military officers affected by the regulations is much broader than the included sub-class of technicians. The plain language, quoted above, and legislative history of the NGTA does not lend itself to an interpretation that regulations touching technicians as a sub-class in a larger, more general classification require approval from the Secretary of Defense. Consequently, only approval of the Secretary of the Air Force was required.

Approval by the Secretary of Air Force.

Even so, plaintiffs next contend, the Secretary of the Air Force did not approve the regulation. The premise is two-fold. First, plaintiffs maintain the Secretary of the Air Force has never delegated to the Chief of Staff statutory authority for approving regulations. However, a review of the Order from the Secretary of the Air Force, Exh. I to

Ct. Rec. 154, against the background of military custom and practice demonstrates an appropriate delegation to the Chief of Staff. See, also, 10 U.S.C. § 8032.[4] In addition, the Department of Air Force is a large and complex organization responsible for providing much of the security of the country. Those possessing high positions of responsibility such as the Chief of Staff and Secretary must necessarily rely and delegate to subordinate levels of staff.

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[4] 10 U.S.C. § 8032 provides:

> (a) The Air Staff shall furnish professional assistance to the Secretary, the Under Secretary, and the Assistant Secretaries of the Air Force, and the Chief of Staff.
>
> (b) The Air Staff shall –
>
> (1) prepare for such employment of the Air Force, and for such recruiting, organizing, supplying, equipping, training, serving, mobilizing, and demobilizing of the Air Force, as will assist in the execution of any power, duty, or function of the Secretary or the Chief of Staff;
>
> (2) investigate and report upon the efficiency of the Air Force and its preparation for military operations;
>
> (3) prepare detailed instructions for the execution of those plans and instructions;
>
> (4) act as agent of the Secretary and the Chief of Staff in coordinating the action of all organizations of the Department of the Air Force; and
>
> (5) perform such other duties, not otherwise assigned by law, as may be prescribed by the Secretary.

Lastly, plaintiffs submit that given a lawful delegation of authority, the Chief of Staff in this case did not concur with the proposed draft of ANGR 36-06. Since neither the Guard Bureau nor the Chief of Staff took additional steps following the alleged nonconcurrence, plaintiffs conclude there has been no approval of the regulation used to terminate plaintiffs.

Initially, defendants did not argue that either the Post letter *or* the Hobson letter, without the other, was sufficient to manifest a concurrence of the proposed rule. Rather, defendants conceded both letters were responsive, but maintained both were manifestations of obvious concurrence. It follows that if one of the two letters was a nonconcurrence, as a matter of accepted military policy and practice, the promulgation was not properly approved and is therefore invalid. However, through its supplemental brief, the United States newly argues that approval from the Judge Advocate General was not required for publication and implementation of the regulation since that responsibility lies solely with the office of primary responsibility. The distinction is an important one for this court concludes that even under the amorphous military tradition and custom of concurring by failing to nonconcur, the Hopson [sic] letter, written after the Post letter, is not susceptible to "obvious" interpretation as argued by defendants.

As elaborated in the Wilson declaration, HQ USAF OPR replies to the request for concurrence and/or comments in one of four ways: (1) concurring without comment; (2) nonconcurring with stated reasons; (3) concurring with comments and/or proposed revisions; or (4) requesting specific changes be made and resubmitted for concurrence. In his deposition, General Weber testified that the Post letter stated concurrence although the

word is not used in the correspondence, by "not saying nonconcurrence." General Weber emphasized that failing to say nonconcurrence, under the military custom of negative implication, "implie[s]" concurrence. The court must agree, with this custom in mind, that the Post letter should be construed as a concurrence. First, Colonel Post stated he "offer[ed]" his comments. The term "offer" signifies a suggestive tone. Next, the two revisions offered were not substantive ones. Thus, a concurrence is easily inferred from the Post letter.

However, General Weber did not examine the Hobson letter in testifying by deposition. In fact, defendants did not surrender the Hobson letter, despite plaintiffs' early discovery request, until after General Weber was deposed. General Weber did not testify that the word "nonconcur" must appear in relevant correspondence. Hence, the matter becomes a question of interpretation of the Hobson letter. In contrast to the Post letter, Mr. Hobson "submitted" his "comments" to the "proposed revisions." This language, unlike Colonel Post's "offer", is declaratory rather than suggestive. Next, in addition to seven other comments, Mr. Hobson states "we question the desirability of permitting the Adjutant General of a state to reverse a decision of the Secretary of the Air Force." This comment constitutes significant substantive questioning. While the interpretation is debatable under normal rules of construction, due to the self-serving military custom and practice of nonspecific written communication, the court, reluctantly, is obliged to conclude Mr. Hobson's letter is a concurrence of the second species. Having so stated, it is unnecessary to determine whether AFR 45-17 may be read to authorize singular concurrence from the Chief's office regardless of how strongly its legal staff disagrees with the propriety of a regulation.

It is additionally noted, as emphasized in this court's earlier Memorandum and Order, Ct. Rec. 113 at 4, that recent Supreme Court and Ninth Circuit precedent have reinforced the inappropriateness of judicial interference in military affairs. *Chappell v. Wallace*, ___ U.S. ___, 103 S.Ct. 2366 (1983); *Trerice v. Pedersen*, ___ F.2d ___, slip op. No. 84-5789 (9th Cir. Aug. 28, 1985). Appellate courts have gone so far as to interpret *Chappell* as foreclosing "consider[ation of] the adequacy of the intraservice remedy." *Mollnow v. Carlton*, 716 F.2d 627, 630 (9th Cir. 1983). It is abundantly clear that trial courts "are bound by the law of their own circuit" regardless of "how egregious in error they may feel their own circuit to be." *Hasbrouck v. Texaco Co.*, 663 F.2d 930, 933 (9th Cir.), *cert. denied*, 459 U.S. 828 (1982).

Because plaintiffs' equal protection and due process arguments were addressed in the court's earlier Memorandum and Order, Ct. Rec. 113, those premises will not be reconsidered here. Defendants' Motions for Summary Judgment are GRANTED. Plaintiffs' Motion is DENIED. The complaint and claims therein are therefore DISMISSED WITH PREJUDICE, and the Clerk shall enter JUDGMENT accordingly.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 11th day of October, 1985.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
United States District Judge

APPENDIX 3

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED P. CHRISTOFFERSEN; WILLIAM J. GIBSON; RICHARD F. MAIN; and JOHN R. WARN, *Plaintiffs-Appellants,* v. WASHINGTON STATE AIR NATIONAL GUARD; THE ADJUTANT GENERAL OF WASHINGTON STATE, MAJOR GENERAL GEORGE COATES; MAJOR GENERAL ROBERT J. COLLINS; THE WASHINGTON STATE TREASURER, ROBERT S. O'BRIEN, *Defendants-Appellees.*	)	No. 85-4315 D.C. No. C81-572-JLQ OPINION

Appeal from the United States District Court for the Eastern District of Washington Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted
August 7, 1986 – Seattle, Washington

Filed August 31, 1988

Before: Cecil F. Poole, William A. Norris and Robert R. Beezer, Circuit Judges.

Opinion by Judge Poole

COUNSEL

Charles Matthew Anderson, Winston & Cashatt, Spokane, Washington, for the plaintiffs-appellants.

John E. Lamp, United States Attorney, and James R. Shively, Assistant United States Attorney, Spokane, Washington; Lt. Col. Guy J. Sternal, Staff Judge Advocate,

USAF, McCord AFB, Washington, D.C.; Ceil Holuk, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

POOLE, Circuit Judge:

Appellants are four former officers and civilian technicians of the Washington State Air National Guard (the Guard, or Washington Guard) who were selected for "nonretention" in the Guard by state Adjutant General Robert Collins pursuant to Air National Guard Regulation (ANGR) 36-06. They were subsequently terminated as federal civil servants. Appellants brought this action under 42 U.S.C. § 1983 against General Collins and the Guard claiming that the decisions not to retain them were based on personal animus and violated their rights to freedom of speech and procedural due process. Appellants also argued that ANGR 36-06 is not authorized by statute, was improperly promulgated, and denies them due process and equal protection. Pursuant to a court order, appellants joined the United States, the Department of Defense, the Department of the Air Force, and the National Guard Bureau (collectively "federal appellees") to answer the challenge to the regulations.

The district court granted summary judgment in favor of General Collins and the Guard, holding that *Chappell v. Wallace*, 462 U.S. 296 (1983), precludes a suit for damages against a military commander and that appellants' claims are also barred by the military noninterference doctrine. After the federal appellees were joined, the district court also granted summary judgment

in their favor, rejecting appellants' challenges to the regulation. We affirm.

FACTS

Each appellant had a dual status as an officer of the Guard and as a federal civilian technician. By statute, each was required to maintain membership in the Guard as a condition for retaining his civil service position. 32 U.S.C. § 709(b). Each appellant had completed over 20 years of military service in July 1978, and therefore had qualified for a military retirement pension at age 60. 10 U.S.C. § 1331(a).

Under ANGR 36-06, ¶ 2, all Air National Guard officers with over 20 years of qualifying military service must be reviewed annually for consideration of retention in, or separation from, their state National Guard. This regulation was developed by the National Guard Bureau, an organization which serves as the channel of communication between the Department of Defense and the various state National Guards, 10 U.S.C. § 3040, and was issued by order of the Secretary of the Air Force. The regulation establishes a "Vitalization Program" for the state National Guards which is designed to ensure combat readiness and inhibit stagnation in the senior grades by providing for the advancement of qualified young officers into positions of greater responsibility. ANGR 36-06, ¶ 2; *see Penagaricano v. Llenza*, 747 F.2d 55, 56 (1st Cir. 1984).

Under the Vitalization Program, an Advisory Board appointed by the state Adjutant General annually reviews every eligible officer to "evaluat[e] the future benefits

that can be expected to accrue to the Air National Guard from [his] continued service." ANGR 36-06, ¶ 10d; *see id.* ¶ 2a. The regulation lists a number of criteria, related both to the qualifications of the individual and the needs of the Air National Guard, to be considered by the Advisory Board in recommending retention or separation of each officer. *Id.* ¶ 10e. One factor is the officer's status with regard to technician retirement eligibility. *Id.* ¶ 10e(4). The state Adjutant General is not bound by recommendations of the Advisory Board and may approve or disapprove any specific recommendation. *Id.* § 11b(1).

The gravamen of appellants' complaint is that they were the victims of a vindictive discharge motivated by their participation in the so-called "human reliability incident." According to appellants, appellant Main, who was then the immediate commander in charge of implementing a nuclear weapons safety program known as the Human Reliability Program, decided upon a temporary disqualification from nuclear missions of two officers whom he suspected of drug trafficking. Notice of this action was prepared by Main, but not forwarded by the Guard to the Air Defense Command (ADC) as required. When Main resisted attempts by Washington Guard Headquarters to have him change his mind, Collins was installed as Main's Squadron Commander. Collins assigned himself to Main's position as immediate commander, but ADC countermanded the assignment because Collins was not a federal employee. The Guard then ordered Main to restore the disqualified officers to flight duty with make-up time for lost flight hours.

Meanwhile, ADC was unaware of Main's temporary disqualification of the two officers. On March 22, 1974,

Main and his assistant, appellant Christoffersen, told an ADC Inspector General of the officers' disqualification and of the Washington Guard's efforts to compel their reinstatement. On March 24, 1974, all nuclear weapons within Washington State were removed from Washington Guard control. On April 20, 1974, all nuclear missions were removed from National Guard units nationwide.

The Guard ordered investigations of the actions taken by Main and Christoffersen regarding the officers' disqualification. Appellant John Warn sat on the investigatory boards which sustained Main and Christoffersen. Appellant William Gibson, Unit commander, supported Main and Christoffersen, and gave them outstanding ratings.

In 1978, an Advisory Board convened to evaluate officers in the Washington Guard and specifically selected each appellant for retention. However, General Collins, now Adjutant General of the Guard, as the reviewing officer, declined to adopt the Advisory Board's recommendations and, instead, approved nonretention of all appellants. As a result of Collins' action, the National Guard Bureau withdrew federal recognition from them and each appellant lost his civilian federal technician position. 32 U.S.C. § 709(e); ANGR 36-06, ¶¶ 11b(2), 11c(1). Appellants were discharged from the Washington Guard upon withdrawal of their federal recognition and were transferred to the inactive United States Air Force Reserve. 10 U.S.C. § 8352(b); ANGR 36-06, ¶ 11c. They were advised in writing that Collins' decisions were nonreviewable.

Collins gave no reasons for nonretention, but later acknowledged that appellants' performance as technicians was not a consideration. Appellants believe Collins was motivated by personal vindictiveness based on the human reliability incident that occurred before he was appointed state Adjutant General.

PROCEEDINGS BELOW

Appellants originally sued in the United States Court of Claims for reinstatement, back pay, benefits, and other damages based on their wrongful termination as civilian technicians. The court granted summary judgment for the United States holding that, because Guardsmen not in active federal service are state employees, appellants failed to state a claim on which relief could be granted. *Christoffersen v. United States*, 230 Ct. Cl. 998 (1982).

Appellants then pursued their claims in the district court under 42 U.S.C. § 1983 against the Washington Guard and Collins. Appellants alleged that they were "involuntarily retired" in violation of their rights under the First Amendment and to procedural due process. Appellants also challenged the validity of ANGR 36-06. On March 31, 1984, the district court granted the state appellees' motion for summary judgment on the issue of liability under section 1983. However, the court refused to dismiss the action and directed appellants to join whatever federal parties would be necessary to resolve the challenges to ANGR 36-06. Accordingly, the federal appellees were joined. On October 11, 1985, after additional discovery, the district court granted the government's motion for summary judgment, ruling that ANGR

36-06 had been properly promulgated and applied. This appeal followed. We heard oral argument on August 7, 1986. On December 2, 1986, submission of this case was vacated, and we ordered all parties to submit supplemental briefs focusing on two questions: (1) whether the appellants' participation in the so-called "human reliability incident" involved the exercise of public authority, as distinguished from "whistleblowing;" and (2) the extent to which the First Amendment protects, as speech, the exercise of public authority by a government official. The parties made their submissions which we considered. On January 5, 1987 we ordered the case resubmitted, and we now affirm the judgments of the district court.

DISCUSSION

A district court order granting summary judgment is reviewed *de novo*. *Sebra v. Neville*, 801 F.2d 1135, 1138 (9th Cir. 1986). This court need only decide whether there are genuine issues of material fact, whether the substantive law was properly applied, and whether the proponents of the motion were entitled to judgment. *Id*

I.

In determining whether a civilian court should review a serviceman's allegation of deprivation of constitutional rights by the military, this Circuit has adopted the multi-factored analysis first outlined in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). *Sebra v. Neville, supra*, 801 F.2d at 1141; *Khalsa v. Weinberger*, 779 F.2d 1393, 1396 (9th Cir.), *reaff'd*. 787 F.2d 1288 (1986); *Helm v. California*,

722 F.2d 507, 509 (9th Cir. 1983); *Gonzalez v. Department of the Army*, 718 F.2d 926, 929 (9th Cir. 1983); *Wallace v. Chappell*, 661 F.2d 729, 732-33 (9th Cir. 1981), *rev'd on other grounds*, 462 U.S. 296 (1983). The *Mindes* test has been adopted by seven other federal circuits. *See Khalsa*, 787 F.2d at 1289 n.1.

Appellees argue that the *Mindes* test is not applicable to this case because judicial review of appellants' section 1983 claims is barred by *Chappell v. Wallace*, 462 U.S. 296 (1983), *rev'g* 661 F.2d 729 (9th Cir. 1981). In *Chappell*, five enlisted men in the United States Navy brought an action for damages and declaratory and injunctive relief against their superior officers. The complaint alleged that in making duty assignments, submitting performance evaluations, and imposing penalties, the officers had discriminated against the enlisted men on the basis of race in violation of their constitutional rights. The complaint also alleged a conspiracy to deprive the enlisted men of equal protection in violation of 42 U.S.C. § 1985(3).

The Court examined the enlisted men's direct constitutional claims to determine whether they stated a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), considering that "[b]efore a *Bivens* remedy may be fashioned . . . a court must take into account any 'special factors counselling hesitation.' " *Chappell*, 462 U.S. at 298. In finding that it would be inappropriate to allow enlisted personnel to recover damages for alleged constitutional violations by their superiors, two "special factors" were determinative: "the unique disciplinary structure of the Military Establishment and Congress' activity in the field." *Id.* at 304.

Chappell's holding is that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." *Id.* at 305; *Mollnow v. Carlton*, 716 F.2d 627, 629-30 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). However, the court did not address the alleged statutory violations, but remanded the case to this court to determine whether the claims for relief under 42 U.S.C. § 1985(3) might be judicially cognizable. *Chappell*, 462 U.S. at 305 n.3. Implicit in the remand order is the recognition that, in some situations, military personnel "may assert that their constitutional and statutory rights have been violated by their superiors." *Gonzalez*, 718 F.2d at 929.

We do not find *Chappell* controlling here. *See Penagaricano*, 747 F.2d at 59; *Mollnow*, 716 F.2d at 631. In *Chappell* the Court was unwilling to extend a judicially created damages remedy to suits against military personnel for alleged constitutional violations. However, the Court's rationale has left the field open for Congress to enact legislation authorizing servicemen's constitutional claims against their superiors. *Chappell*, 462 U.S. at 304; *Mollnow*, 716 F.2d at 631. The issue before us is whether appellants' claims under 42 U.S.C. § 1983 to reinstatement and damages are justiciable given the special characteristics of the military setting. We need not decide whether *Chappell* bars any or all section 1983 claims for alleged civil rights violations by military personnel. *But see Martelon v. Temple*, 747 F.2d 1348, 1351 (10th Cir. 1984) (by enacting section 1983, Congress did not intend to create liability on the part of military superiors for transgressions against the rights of other military personnel), *cert. denied*, 471 U.S. 1135 (1985). Even assuming that *Chappell*

does not bar section 1983 actions by military personnel, we find the particular claims raised by appellants are nonreviewable.

II.

Appellants argue that the *Mindes* test, reflecting only limited reviewability of certain military decisions, should be applied only where the importance of military decision-making autonomy is apparent and an adequate alternative dispute resolution mechanism exists. Appellants claim that deferential review is inappropriate in this case because the Washington Guard is a state agency not in active military service. In addition, they assert that no intraservice remedy, analogous to the military justice system, exists for resolution of their claims.

Appellants' arguments are unpersuasive. The Washington Guard is a state agency, but it is also part of the organized militia of the United States, 10 U.S.C. § 101(12), and may be called to active service at any time. 10 U.S.C. § 8500. The availablilty of an intraservice remedy is one factor to be considered in the justiciability equation, but the alleged absence of such a remedy does not preclude application of the *Mindes* test. *See Mollnow*, 716 F.2d at 629 (the Supreme Court discussed the availability of intraservice remedies in *Chappell*, but did not suggest that an inadequate remedy would change its result). Moreover, in *Sebra v. Neville, supra*, 801 F.2d at 1141, we specifically held that the *Mindes* test is the appropriate standard to determine whether claims brought by National Guard technicians are reviewable. *Accord Penagaricano*, 747 F.2d

at 61-64; *NeSmith v. Fulton*, 615 F.2d 196, 201-03 (5th Cir. 1980).

As modified by this Circuit, the *Mindes* test declares that:

> an internal military decision is unreviewable unless the plaintiff alleges (a) a violation of [a recognized constitutional right], a federal statute, or military regulations; and (b) exhaustion of available intraservice remedies. If the plaintiff meets both prerequisites, the trial court must weigh four factors to determine whether review should be granted:
>
> (1) *The nature and strength of the plaintiff's claim. . . .*
>
> (2) *The potential injury to the plaintiff if review is refused.*
>
> (3) *The extent of interference with military functions.*
>
> (4) *The extent to which military discretion or expertise is involved.*

Khalsa, 779 F.2d at 1398 (*quoting Wallace v. Chappell*, 661 F.2d at 732-33) (emphasis in original); *see also Sandidge v. Washington*, 813 F.2d 1025, 1026 (9th Cir. 1987); *Sebra*, 801 F.2d at 1141.

As to the first phase of this analysis, appellants do allege violations of recognized constitutional rights. Appellants also argue that they have satisfied the exhaustion requirement because no intraservice remedy is available. ANGR 36-06 does not provide a means for a rejected officer to obtain review of an Adjutant General's nonretention decision, *see Penagaricano*, 747 F.2d at 57, and appellants contend that there is no remedy available under the laws of Washington State. However, it appears that appellants could have sought relief from the Air Force Board for correction of Military Records under 10

U.S.C. § 1552. *See Navas v. Gonzalez Vales*, 752 F.2d 765, 769-70 (1st Cir. 1985); *Penagaricano*, 747 F.2d at 57; *see also Chappell*, 462 U.S. at 303 (Court identified Board for Correction of Naval Records as an intraservice administrative remedy for aggrieved enlisted men). If the Records Board determines that an officer's nonretention was the consequence of error or injustice, it can correct federal records to show that federal recognition has not been withdrawn and can reinstate the officer in a comparable active federal reserve status, restore his pay, and order compensatory back pay. *Penagaricano*, 747 F.2d at 57.

The parties have not made an issue of the availability of review by the Records Board, which has no power to force Washington to reinstate appellants in the Washington Guard. *See id.* Appellees suggest that if appellants had obtained a definitive interpretation of ANGR 36-06 in their favor from the Records Board, the Washington Guard might have reinstated them as a matter of comity. *See Navas*, 752 F.2d at 770. However, there is no evidence to support this contention. Given that the Records Board could not provide effective relief against the state appellees, we will assume that appellants have exhausted all available remedies and address the four factors required by the second phase of the *Mindes* test. On balance these factors favor finding appellants' claims non-reviewable.

We first must assess the nature and strength of appellants' constitutional claims. According to appellants, Collins violated their First Amendment right to free speech because he terminated them for "whistleblowing," that is, speaking out regarding a violation of federal regulations governing nuclear weapons safety. Following a careful review of the record and supplemental briefing ordered

in this case, we are constrained to disagree. As the immediate commander in charge of implementing the Human Reliability Program, Main had military authority to temporarily disqualify the two officers. His preparation of notice to the ADC was simply the means of effectuating his exercise of that authority. The statements made by Main and Christoffersen during their meeting with the ADC Inspector General were designed to replace the unforwarded notice and effectuate Main's exercise of military authority by thwarting the Washington Guard's attempts to reinstate the disqualified officers. Similarly, Warn's actions as an investigatory board member, and Gibson's actions as unit commander and officer evaluator, consisted of nothing more than the exercise of military authority. The appellants' exercise of their military authority, even though accomplished through the use of words, does not constitute "whistleblowing."

Appellants contend that, even if they merely exercised their military authority, such exercise was constitutionally protected. They assert that the appropriate test of First Amendment protection requires a balancing of "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers*, 461 U.S. 138, 142 (1983) (*quoting Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). Whether speech is constitutionally protected is an issue of law. *Id.* at 148 n.7.

We may assume, without deciding, that the *Connick* test applies to appellants' exercise of military authority in which they addressed a matter of public concern, i.e.,

nuclear weapons safety. We nonetheless hold that whatever First Amendement interests are implicated by this exercise are outweighed by Washington State's strong interest in promoting the efficiency of the military services it provides through the Washington Guard. The ability of the Washington Guard to make even routine personnel decisions would be severely impaired if we were to hold otherwise. *See McAdams v. Matagorda County Appraisal District*, 798 F.2d 842, 848 (5th Cir. 1986).

Appellants also assert that their termination from the Washington Guard deprived them of a protected entitlement to continued employment as civilian technicians without procedural due process. Appellants claim that their expectancy is based upon the National Guard Technicians Act and its legislative history. Pub. L. No. 90-486, 82 Stat. 755 (1968). The Act specifically allows the Secretary of the Air Force to exempt technicians in the Air National Guard from the mandatory effect of Air Force retirement laws until age 60, thereby allowing technicians to receive maximum retirement benefits. Pub. L. No. 90-486, § 9(2) (codified at 10 U.S.C. §§ 8848(c), 8851(c)). Appellants also base their expectancy on a written National Guard Bureau policy to retain technicians to age 55, and on National Guard custom.

Appellants' argument that Collins violated their right to procedural due process is without merit because they have no constitutionally protected property interest in continued employment with the Washington Guard. *See Navas*, 752 F.2d at 768; *Penagaricano*, 747 F.2d at 62; *Walker v. Alexander*, 569 F.2d 291, 294 (5th Cir. 1978). Moreover, appellants lost any protected interest in their civilian technician positions when their military membership in

the National Guard ended. *See Tennessee v. Dunlap*, 426 U.S. 312, 316 (1976). Appellants' reliance on the National Guard Technicians Act, which simply allows but does not require the retention of qualified technicians, is misplaced. The Act is directed to the Secretary of the Air Force and does not purport to limit the role of state National Guards in making retirement decisions. *See* 10 U.S.C. §§ 8848(c), 8851(c). Similarly, the fact that ANGR 36-06 directs an Advisory Board to consider an officer's status as a civilian technician in making a recommendation to the Adjutant General does not support appellants' due process claim. *See Navas*, 752 F.2d at 768 (regulation only creates a property interest if it explicitly or implicitly gives rise to an entitlement to continued employment).

Because both of appellants' constitutional claims are meritless, we conclude that the first *Mindes* factor does not favor reviewability of Collins' nonretention decisions.

The second factor to be considered is the potential injury to appellants if review is denied. As a result of their nonretention in the Washington Guard, appellants have lost both military and civilian employment. Christoffersen and Main have lost their eligibility for civil service retirement benefits, and Warn and Gibson will not qualify for full amount of civil service benefits they would have received if allowed to serve until age 55. However, each appellant is qualified for a military retirement pension at age 60. The potential injury to appellants is primarily economic. *See Helm*, 722 F.2d at 510.

If this court refuses review, appellants still will be able to seek review before the Air Force Board for Correction of Military Records under 10 U.S.C. § 1552. If proper

grounds for relief were presented, the Records Board could reinstate each appellant in active federal reserve status, restore his pay, and order back pay. *Penagaricano*, 747 F.2d at 57. However, although the refusal of judicial review would not leave appellants without a remedy, we recognize that the Records Board could not provide any relief with respect to the state appellees. Thus the second *Mindes* factor tips, but not strongly, in appellants' favor. *See id.* at 62.

The third and fourth factors to be considered are the extent of interference with military functions and the extent to which military discretion or expertise is involved. To permit judicial review of the internal military decisions at issue here would seriously impede the military in performance of its vital duties. *Penagaricano*, 747 F.2d at 63; *Turner v. Egan*, 358 F.Supp. 560, 564 (D. Alaska) (three judge district court), *aff'd mem.* 414 U.S. 1105 (1973). Military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy, *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986), including the Vitalization Program, which is essential to maintain a high capability of the National Guard. *Turner*, 358 F.Supp. at 564. If courts were routinely to entertain complaints like appellants' the Vitalization Program could be significantly impaired. *Penagaricano*, 747 F.2d at 62. Claims challenging retention decisions in civilian court could force the Washington Guard to "exist in limbo awaiting the outcome of lengthy litigation, rather than conducting an orderly training program directed to sharpening its operational readiness." *Id.* at 62-63 (*quoting Turner*, 358 F. Supp. at 564). Judicial review could also impair the ability of the National Guard to

make retention decisions based on subjective, though appropriate, criteria of military efficiency. *Id.* at 63. We have previously noted that particular caution is required when we are asked to review "military transfer decisions [which] go to the core of deployment of troops and overall strategies of preparedness." *Sebra*, 801 F.2d at 1142. This admonition carries even greater force with respect to retention decisions. *See Dilley v. Alexander*, 603 F.2d 914, 919 (D.C. Cir. 1979) (deference to military discretion is at its height when personnel decisions such as discharge are challenged), *clarified*, 627 F.2d 407 (1980); *accord Penagaricano*, 747 F.2d at 63; *Pauls v. Secretary of Air Force*, 457 F.2d 294 (1st Cir. 1972); *Johnson v. Orr*, 617 F. Supp. 170, 172 (E.D. Cal. 1985), *aff'd mem.* 787 F.2d 597 (9th Cir. 1986); *benShalom v. Secretary of Army*, 489 F. Supp. 964, 971 (E.D. Wis. 1980).

Appellants argue that Adjutant General Collins acted arbitrarily because he ignored the Advisory Board's recommendation that appellants be retained in the Washington Guard. While there might be merit to this claim, we disagree with appellants' argument that the challenged nonretention decisions do not require a high degree of military discretion and expertise. *Penagaricano*, 747 F.2d at 63. As a practical matter there is no way that judicial review could be limited to consideration of Appellants First Amendment claim. The district court could not reach a judgment without exposing itself to all the pros and cons of the nonretention decisions. *Id.* Collins and the officers who participated on the Advisory Board would have to be examined to determine the grounds and motives for their actions. *See Sandidge*, 813 F.2d at 1027; *Gonzalez*, 718 F.2d at 930. However, ANGR 36-06 gives

these military personnel essentially unlimited discretion in making nonretention decisions. The regulation clearly requires the Advisory Board and Adjutant General to apply their expertise regarding projected Washington Guard needs and present capabilities. *See* ANGR 36-06, ¶ 10e. "[C]ourts must give great deference to the professional judgment of military authorities." *Goldman*, 475 U.S. at 507. Thus the third and fourth *Mindes* factors weigh heavily against review of the challenged nonretention decisions.

On balance, then, we conclude the *Mindes* factors weigh against reviewability of appellants' constitutional claims.

III.

Appellants challenge ANGR 36-06 on numerous grounds. They argue that the regulation (1) lacks legal authority and conflicts with the National Guard Technicians Act, (2) was improperly issued, and (3) denied them due process and equal protection. None of these arguments has merit.

A. *Legal Basis for ANGR 36-06*

Appellants argue that ANGR 36-06 is illegal because no federal statute authorizes the Vitalization Program developed by the National Guard Bureau. They also argue, somewhat inconsistently, that a federal regulation cannot be used to terminate a Guardsman commissioned under state law.

Congress' authority over the military extends to the National Guard, *see* U.S. Const. art. I. § 8, cl. 16, and

Congress has authorized the Secretary of the Air Force to regulate the Air National Guard. 10 U.S.C. § 8077. Based on these constitutional and statutory provisions, we reject appellants' arguments that ANGR 36-06 is not authorized and that a federal regulation cannot be applied to officers in a state National Guard.

Appellants also claim that ANGR 36-06 conflicts with the National Guard Technicians Act, which exempts technicians from Air Force retirement laws. *See* 10 U.S.C. §§ 8848(c), 8851(c). This argument must be rejected for the reasons discussed earlier: the Act permits, but does not require, retention of technicians, and does not limit the authority of state National Guards to make retirement decisions.

B. *ANGR Was Properly Issued.*

Relying on the National Guard Technicians Act, appellants argue the Secretary of Defense was required to approve ANGR 36-06. *See* Pub. L. No. 90-486, § 10, 82 Stat. 755 (1968). The problem with this argument is that the regulation was not issued under the National Guard Technicians Act. ANGR 36-06 is a military personnel regulation, not a technician regulation. The class of military personnel affected by the regulation is much broader than the subclass of technicians. Therefore, approval by the Secretary of Defense was not required.

Appellants argue that even if the Secretary of the Air Force could approve ANGR 36-06, he did not do so. Appellants claim that only two officers of the Air Staff reviewed the proposed regulation, and that these officers

submitted comments to the National Guard Bureau, but did not specifically concur.

Appellants' argument that the Secretary of the Air Force could not delegate authority to approve the regulation to the Air Staff must be rejected. *See* 10 U.S.C. §§ 8013(f), 8032. Moreover, the record shows that the Air Staff properly concurred prior to issuance of ANGR 36-06. Standard Air Force practice is that a concurrence may be made with or without comments, but that a nonconcurrence must be expressly stated. Therefore, the comments submitted by the Air Staff officers on the proposed regulation, which do not explicitly withhold approval, constitute concurrences.

C. *Due Process and Equal Protection*

Appellants argue the ANGR 36-06 violates due process because they were deprived of a protected property interest without an opportunity to challenge the actions of the state Adjutant General. This argument must be rejected because, as discussed earlier, appellants had no right to continued employment in the Washington Guard or as civilian technicians. *See Tennessee v. Dunlap*, 426 U.S. at 316; *Navas*, 752 F.2d at 768; *Penagaricano*, 747 F.2d at 62; *Walker*, 569 F.2d at 294.

Appellants' equal protection argument is based on an allege difference between the Vitalization Program regulations covering the Air and Army National Guards. According to appellants, under the Army National Guard regulation, NGR 635-102, an officer favorably reviewed

by an Advisory Board cannot be discharged by the Adjutant General. In contrast, ANGR 36-06 allowed Collins to ignore the Advisory Board's recommendations that each appellant be retained in the Washington Guard.

Appellants' equal protection challenge to ANGR 36-06 must be rejected. Appellants rely on the affidavit of a former state Assistant Adjutant General and Brigadier General in the Washington Army National Guard to describe the Army National Guard's Vitalization Program. However, the record shows that the regulations covering the Army and Air National Guards were identical at all times relevant to this litigation. The Army National Guard Regulation was not changed until December 31, 1979, to prevent an Adjutant General from overturning an Advisory Board's recommendation to retain a particular officer. *Compare,* NGR 635-102 ¶ 6 (Sept. 28, 1973), *with* NGR 635-102 ¶ 6i(l) (March 22, 1982).

AFFIRMED.

APPENDIX 4

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED P. CHRISTOFFERSEN; WILLIAM J. GIBSON; RICHARD F. MAIN; and JOHN R. WARN, Plaintiffs-Appellants, v. WASHINGTON STATE AIR NATIONAL GUARD; THE ADJUTANT GENERAL OF WASHINGTON STATE, MAJOR GENERAL GEORGE COATES; MAJOR GENERAL ROBERT J. COLLINS; THE WASHINGTON STATE TREASURER, ROBERT S. O'BRIEN, Defendants-Appellees.	)	No. 85-4315 D.C. No. C81-572-JLQ **ORDER** (Filed December 15, 1988)

Before: POOLE, NORRIS and BEEZER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED P. CHRISTOFFERSEN; WILLIAM J. BIGSON; [sic] RICHARD F. MAIN; and JOHN R. WARN, Plaintiffs-Appellants,	)	No. 85-4315 CV-81-572-JLQ (Filed December 27, 1988)
vs.	)	
WASHINGTON STATE AIR NATIONAL GUARD, et al, Defendants-Appellees.	)	

APPEAL from the United States District Court for the ___ District of ___.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the EASTERN District of WASHINGTON (SPOKANE) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ___ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered 8/31/88

APPENDIX 6

IN THE UNITED STATES COURT OF CLAIMS

No. 507-80C

ALFRED P. CHRISTOFFERSEN, WILLIAM J. GIBSON, RICHARD F. MAIN, and JOHN R. WARN, Plaintiffs, v. THE UNITED STATES Defendant.	*Military pay; legality of termination of National Guard military and technician positions; lack of jurisdiction.* (Filed May 28, 1982)

Charles Matthew Andersen, attorney of record, for plaintiffs. *Winston & Cashatt* and *Richard L. Swick*, of counsel.

Stephen G. Anderson, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant. *Thomas J. Fiscus*, Capt., USAF, of counsel.

Before KASHIWA, BENNETT and SMITH, *Judges*.

ORDER

Plaintiffs bring this action for reinstatement, back pay, allowances, benefits and other damages arising out of the alleged wrongful termination of employment as

civilian (federal) technicians and involuntary retirement from the Washington State National Guard. Defendant has brought a motion for summary judgment which plaintiffs oppose. For the reasons stated, defendant's motion is granted.

Plaintiffs were all longtime officers in the National Guard (NG) who also held positions as civilian "technicians" in the Guard. Over the course of their military careers, plaintiffs Christoffersen, Main, and Warn were promoted to the grade of lieutenant colonel, Gibson to the grade of colonel. In July 1978, each plaintiff was considered pursuant to Air National Guard Regulation (ANGR) 36-06 for selective retention, having accumulated over 20 years of service qualifying for retirement pay. ANGR 36-06 was issued in furtherance of the policy of "vitalization" of the Air NG, which is "essential to avoid loss of combat readiness in a maturing force. Lack of promotion possibility and stagnation in the senior grades preclude providing for progression of qualified officers into positions of greater responsibility at the proper phase-points of their careers." ANGR 36-06, ¶ 2 (October 7, 1977). In order to administer this policy, an advisory vitalization board performs an annual review of all officers with over 20 years of qualifying service. Recommendations of the board are forwarded to the State Adjutant General (AG). Plaintiffs were all reviewed by the board, and in each case plaintiff was recommended for retention in the NG. The AG, however, decided against retention, and notified each plaintiff in writing of his decision. Nowhere in the record is there any statement or evidence that plaintiffs had not satisfactorily performed their duties as either guardsmen or technicians. Plaintiffs

Christoffersen, Gibson, and Main were honorably discharged from their military positions in September 1978, Warn in October 1978. Plaintiffs' civilian technician positions, under 32 U.S.C. § 709 (1976), are predicated upon active military status in the NG.[1] Accordingly, plaintiffs were terminated from their technician postitions upon their dismissal from their military positions. After their involuntary separation form their concurrent positions, plaintiffs were transferred to the inactive U.S. Air Force Reserve, as required by ANGR 36-06, ¶11c. Plaintiffs filed suit in this court on September 16, 1980.

Plaintiffs allege that they are entitled to relief in this court on the basis of five claims: (1) plaintiffs' nonretention was arbitrary and capricious and in violation of applicable regulations, all in violation of the due process rights of plaintiffs; (2) plaintiffs' dismissal by AG was justified on the basis of (then) Governor Ray's desire for a change in the mid-level management of the Air NG, in violation of regulations and due process; (3) the National Guard Bureau, by failing to sufficiently investigate or reconsider the matter or give plaintiffs an opportunity for continuation as technicians until age 60, deprived plaintiffs of their property rights without due process; (4) plaintiffs were denied their statutory and regulatory appeal rights in violation of due process; and (5) dismissal of the plaintiffs was a subterfuge instigated by the

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[1] 32 U.S.C. § 709(e)(1) states that a technician "who is separated from the National Guard or ceases to hold the military grade specified for his position *** shall be promptly separated from his technician employment ***." *See also* section 709(b).

AG and Governor Ray in order to promote more politically acceptable individuals, in violation of plaintiffs' First Amendment rights to free speech and association, and an improper objective of Air Force regulations.

Defendant argues that even if plaintiffs' allegations are correct (which defendant concedes only for the sake of argument), plaintiffs would still have no valid monetary claim against the United States. This court, therefore, would have no jurisdiction in this matter. Defendant argues that our recent decision in *Gnagy v. United States*, 225 Ct. Cl. ___, 634 F.2d 574 (1980), is dispositive of any claim within our jurisdiction. We agree that if plaintiffs cannot sufficiently differentiate their case from *Gnagy*, defendant is entitled to summary judgment.

The crucial issue to be decided here is whether any of the alleged wrongs involved in the plaintiffs' dismissal constitute a proper action against the United States. For our purposes, the merits of any of plaintiffs' claims are only relevant if their proof would result in a remedy within our jurisdiction. At the heart of this issue is the federal or state characterization of plaintiffs' concurrent positions as military officers and civilian technicians. This is precisely the issue that this court resolved in *Gnagy*.

The issue decided in *Gnagy* was whether a military member of the NG, not in active federal service, is a federal "employee" for purposes of the Back Pay Act. 5 U.S.C. § 5596 (1976). The plaintiff in *Gnagy* was a first sergeant in the California Army National Guard and also held the concurrent position of civilian technician. Plaintiff, after serving more than 20 years qualifying for military retirement, was considered for retention by a board

set up under Army NG regulations similar to ANGR 36-06. Unlike the present case, in *Gnagy* the board recommended that plaintiff not be retained. Accordingly, plaintiff was given an honorable discharge from the military and his technician position was terminated pursuant to 32 U.S.C. § 709(e)(1). Plaintiff claimed that his discharge was based upon a derogatory report which failed to abide by regulations and the board failed to consider information favorable to the plaintiff.

In *Gnagy* we held that a member of an NG unit not in active federal service is not a federal employee, in his military capacity, for purposes of the Back Pay Act. This court went on to say, "Rather, he is a state employee. We are aware of no federal constitutional provision, statute, or regulation which authorizes this court to award monetary relief to a wrongfully discharged state employee." 225 Ct. Cl. ___ n.19, 634 F.2d at 579 n.19. As to plaintiff's claim for recovery for loss of employment as a technician (admittedly a federal position),[2] this court held that no recovery was permitted under the Back Pay Act since the action was neither "unjustified or unwarranted"--rather, the loss of civilian employment was mandated by statute. 32 U.S.C. § 709(e)(1). As a consequence of these holdings, the plaintiff's claims were dismissed without discussion of the underlying merits of the claims.

Plaintiffs argue that *Gnagy* is not applicable and therefore not a bar to their claims for relief. Plaintiffs

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[2] 32 U.S.C. § 709(d) states that "A technician *** is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States."

point out that in *Gnagy* the plaintiff was not recommended for retention by the board. Here, plaintiffs were recommended for retention and were only discharged as a result of the allegedly illegal actions of the AG. Plaintiffs state that as officers, unlike Gnagy, they were entitled to certain procedures unavailable to an enlisted soldier. Plaintiffs argue that the AG's actions present a "proximate factual question of a federal agent acting under color of a federal regulation" which creates a federal cause of action.

We do not believe that the facts and arguments presented here are sufficiently distinguishable from *Gnagy* to permit plaintiffs a trial on the merits. Plaintiffs' attempts to distinguish *Gnagy* fail to come to grips with the underlying rationale of the decision--namely, plaintiffs in their military NG capacity are state, not federal, employees. As a consequence, all of the plaintiffs' substantive claims relate to alleged wrongs to which this court has no jurisdiction. The basis of most of plaintiffs' claims is the alleged wrongful dismissal by the AG. As this court pointed out in *Gnagy*, even if it is assumed that the AG is acting as a federal agent, plaintiffs are not federal employees, "Hence, the status of the commanding general [substantively the same position as the AG for this purpose] and his subordinates relative to the enlisted qualitative retention program does not impact on the issue whether plaintiff's former membership in the California Guard qualifies plaintiff as a federal employee for purposes of the Back Pay Act." 225 Ct. Cl. at ___ n. 11, 634 F.2d at 577 n.11.

Plaintiffs cite numerous cases to support their position that they are entitled to relief in this court. However,

in none of these cases was the plaintiff dismissed from his civilian technician position solely as a result of loss of NG military membership. In *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1980), plaintiff was initially dismissed from his technician position, not as a matter of law under 32 U.S.C. § 709(e)(1). 615 F.2d at 200. In *Athas v. United States*, 220 Ct. Cl. 96, 597 F.2d 722 (1979), plaintiffs were civilian administrators in the Alaska Air NG who were not apprised of their right to appeal. The adverse personnel action was unrelated to the issue of dismissal resulting from loss of military membership in the NG. *Chaudoin v. Atkinson*, 494 F.2d 1323 (3d Cir. 1974), is similarly inapposite: the plaintiff was dismissed for cause relating to his (federal) civilian status. As this court stated in *Gnagy*, "There is no statute conferring federal employee status as an incident of membership in a National Guard unit not in active federal service. Hence, the facts underlying *Chaudoin* are different from the facts here and the holding in *Chaudoin* is unrelated to the issue here." 225 Ct. Cl. at ___, 634 F.2d at 577. Plaintiffs have not cited any cases where a federal cause of action arose from the loss of a federal technician position due to operation of law under 32 U.S.C. § 709(e)(1).

Plaintiffs argue that they had a "protected property interest" in their technician positions until acquisition of the maximum retirement annuity at age 55, and they were deprived of this right without due process of law. Plaintiffs base their claim on an alleged practice of the National Guard Bureau to grant "waivers" from mandated retirement. A similar claim was rejected in a Fifth Circuit case, *Walker v. Alexander*, 569 F.2d 291 (1978). There, the court noted that the U.S. Supreme Court has

held that section 709(e)(1) forms a valid basis for terminations of a technician's employment without proof of "cause." *Tennessee v. Dunlap*, 426 U.S. 312 (1976). In *Walker*, as in the present case, plaintiff was subject to "selective retention" regulations which create no expectation of future employment once a serviceman reaches the requisite number of years of qualifying service. The court therefore concluded that the plaintiff "had no property right in his retention as a commissioned officer in the Florida National Guard." 569 F.2d at 294.

Plaintiffs rely on *Bollen v. National Guard Bureau*, 449 F.Supp. 343 (W.D. Pa. 1978), where a district court found a property interest in continued military employment as a result of a letter by the Chief of the National Guard Bureau. This letter contained a "one time list" of officers who were to be retained until age 60 provided they remained fully qualified for their military positions and properly performed their technician jobs. 449 F.Supp. at 350. However, plaintiffs do not allege that they were included in this list. Furthermore, the court in *Bollen* did not address the issue of a technician who is dismissed pursuant to 32 U.S.C. § 709(e)(1).

Plaintiffs claim that they were improperly denied a right of appeal from the termination of their technician positions. But plaintiffs can point to no applicable statute or regulation which confers a right of adminstrative appeal where the termination results from the loss of military status. The appeal rights contained in Technician Personnel Manual (TPM) 700 specifically state that its provisions do not apply where the technician is separated due to loss of military membership (where required as a condition of employment). TPM 700, Chapter

753.1-1(b)(2). As mentioned earlier, the Supreme Court has held that dismissal under 32 U.S.C. § 709(e)(1) is not a "for cause" action, so no due process violation resulted where a request for a hearing was denied. *Tennessee v. Dunlap, supra.*

In the final analysis, there is no theory available to plaintiffs which would permit recovery in this court consistent with our holding in *Gnagy*. As in *Gnagy*, plaintiffs were terminated from their technician positions due to the loss of their military positions in the NG. Such termination was mandated by statute. 32 U.S.C. § 709(e)(1). Any claim of illegality resulting from plaintiffs' termination, therefore, must by necessity turn on plaintiffs' loss of their military NG positions. Since we have previously stated that a military member of the NG, not in active federal service, is a state employee, plaintiffs have no basis for recovery of monetary damages against the United States in these circumstances. Even if it can be shown that plaintiffs' dismissal from the NG was improper, such an action would not properly be before this court.

IT IS THEREFORE ORDERED, upon consideration of defendant's motion for summary judgment and plaintiff's opposition thereto, without oral argument, that plaintiffs have failed to state a claim upon which relief can be granted. The motion is granted and the petition is dismissed.

BY THE COURT
/s/ Marion T. Bennett
Marion T. Bennett
Judge

May 28 1982

APPENDIX 7

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ALFRED P. CHRISTOFFERSEN, et al.	JUDGMENT IN A CIVIL CASE
V.	(Filed October 11, 1985)
THE WASHINGTON STATE AIR NATIONAL GUARD, et al.	CASE NUMBER: C-81-572-JLQ

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the defendants' Motions for Summary Judgment are granted; plaintiffs' Motion is denied; and the complaint and claims therein are dismissed with prejudice.

October 11, 1985 — *Date*

J. R. FALLQUIST — *Clerk*

(By) Deputy Clerk

APPENDIX 8

DEPARTMENT OF THE AIR FORCE
Headquarters, US Air Force
Washington DC 20330

CHANGE B
ANGR 36-05
31 December 1968

Officer Personnel
SEPARATION OF AIR NATIONAL GUARD OFFICERS

ANGR 36-05, 19 December 1957, is changed as follows:

4f. Actions hereunder will be effected without regard to sex, race, color, creed, or national origin.

9c. *Special Retention*. An Air National Guard officer employed as a technician under 32 USC 709 in a position for which Air National Guard membership is required, who would otherwise be removed from an active status under 10 USC 8848 or 8851 for length of service or time in grade, may be retained in an active status until age 60 under PL 90-186 by the Chief, National Guard Bureau.

(1) Retention will be authorized until the officer completes eligibility for an immediate annuity, at age 55, under the Civil Service Retirement System or under a State retirement system for those officers who elected to continue membership therein. The Chief, National Guard Bureau may waive this restriction for singularly outstanding individuals whose records clearly justify further retention, not to exceed age 60.

(2) Requests for retention must be completely justified and submitted to the Chief, National Guard Bureau, at least 6 months prior to the date the officer would otherwise be removed from an active status because of

completion of years of service or time in grade provisions of 10 USC 8848 or 8851.

(3) Notwithstanding any other provision of this regulation, an officer who became a civilian employee of the Air National Guard prior to 1 July 1955 will not, before attaining age 60, while so employed be removed without his consent from an active status within the Air National Guard by reason of any mandatory promotion procedure except for cause, physical disability, or by reason of being twice deferred for promotion. In the event a vacancy does not exist in the higher grade for which selected, a grade augmentation may be effected by the State, within established policy.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

WINSTON P. WILSON, *Major General*
Chief, National Guard Bureau

C. C. BOATWRIGHT, *Colonel*
Executive, National Guard Bureau

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APPENDIX 9

DEPARTMENT OF THE AIR FORCE
Headquarters, US Air Force ANG REGULATION 36-06
Washington DC 20330 7 October 1977

Officer Personnel

SELECTIVE RETENTION OF AIR NATIONAL GUARD OFFICER PERSONNEL

This regulation outlines the procedures for establishment and conduct of advisory boards in the Air National Guard program for selective retention of officers beyond 20 years of qualifying service for retired pay. The word "he" as used in this regulation is intended to include both male and female, unless otherwise indicated.

	Paragraph
Terms Explained	1
Policy	2
Criteria	3
Procedures	4
Appointment of Advisory Board	5
Composition of Advisory Board	6
Organization of Advisory Board	7
Communications for Advisory Board	8
Personnel Data for Advisory Board	9
Procedures for Conducting Advisory Board	10
Actions on Advisory Board Reports	11
Separation for Other Reasons	12
Administrative Actions	13

Attachments Page
1. Letter Format for Notification of Controlled Attrition and Selective Retention in ANG Status 5
2. Special Order Format for Appointment of Advisory Board Membership..... 6
3. Advisory Board Report Format..... 7
4. Minority Report Format..... 8
5. Roster Format "Officers Recommended for Retention" 9
6. Roster Format "Officers Not Recommended for Retention" 10
7. Letter Format "Selective Retention in ANG Status" (selected) 11
8. Letter Format "Selective Retention in ANG Status" (not selected) 12

1. Terms Explained:

a. Officer. For the purpose of being considered for retention under this regulation, the term "officer" includes all commissioned officers and warrant officers of the Air National Guard, including Air Technicians, except for adjutants general, assistant adjutants general, and general officers.

b. Qualifying Service Creditable for Retired Pay. Combined total of commissioned, warrant, and enlisted service, which is creditable for retired pay under chapter

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Supersedes ANGR 36-06, 23 January 1976. (For summary of revised, deleted, or added material, see signature page.)

OPR: NGB/DPM (Lt Col John Hawthorne)
Approved: MG LaVern E. Weber, USA
Writer-Editor: Doreen M. White
DISTRIBUTION: B

67 of Title 10, United States Code, including service with other DOD components.

2. Policy. Membership in the Air National Guard of the United States is not an inherent right of any individual. It is a privilege and confers upon an individual an obligation to serve in the active military service in the event of mobilization or emergency, or at such other times as the national security may require. A continuing program of vitalization of the Air National Guard is essential to avoid loss of combat readiness in a maturing force. Lack of promotion possibility and stagnation in the senior grades preclude providing for progression of qualified officers into positions of greater responsibility at the proper phase-points of their careers. To accomplish this program of officer development, all ANG commissioned officers and warrant officers with over 20 years of qualifying service for retirement will be reviewed each year for consideration of retention or separation. This program will be achieved by controlled attrition and selective retention of officers qualified for retirement under chapter 67 of Title 10, United States Code.

a. A board of officers will be appointed by the State Adjutant General each calendar year for the purpose of making recommendations for the retention or separation of officers in the Air National Guard of that State. A single board may consider all officers or separate boards may be convened to consider officers by grades.

b. Boards may be convened at any time during the calendar year, but must be held in sufficient time to provide for reports to be received by the Chief, National Guard Bureau on or before 31 October.

c. Except as provided in paragraphs 6b and 13c, consideration under this regulation is mandatory for every eligible officer.

3. Criteria. Officers being considered for retention will meet the following criteria:

a. Must have accrued 20 or more years of service required to qualify for retired pay at age 60 on or before the date the board convenes. Officers previously selected for retention under any authority, including those retained past mandatory removal date under the provisions of sections 8848b, 8848c, and 8851c of Title 10, United States Code, will be included and again considered.

b. Must have been verified as being eligible for retired pay at age 60.

c. Are physically qualified for worldwide assignment. Prior to consideration by a board convened under this regulation, an officer whose last physical examination was conducted more than 1 year before the date the board convenes and required waiver of any factor will be given a new physical examination. Waivers granted more than 1 year before the date the board convenes must be reevaluated. In the event the waiver is revalidated by the National Guard Bureau, officer will then be considered by the board.

4. Procedures:

a. The Chief, National Guard Bureau will, not later than 31 January of each year, furnish each Adjutant General a listing of all officers under his jurisdiction who are

certified as having 20 years of qualifying service creditable for retired pay.

b. The Adjutant General will verify that the officers listed meet the criteria specified above and will add to the listing any officers certified subsequent to production of the listing. He will send an informative letter on "controlled attrition and selective retention in the Air National Guard" to each officer concerned (attachment 1). NOTE: This letter and other sample letters attached to this regulation may be modified to fit local circumstances.

5. Appointment of Advisory Board. The board will be appointed by the Adjutant General of the State by composed order and addressed directly to the individuals appointed (attachment 2).

6. Composition of Advisory Board. The board will be composed of not less than three commissioned officers with voting authority. Members may be selected from the Air National Guard, and with the concurrence of the commander concerned, from other components of the Air Force. The majority of the members will be from the Air National Guard. Tenure of office officers, other than the Adjutant General, are eligible to serve. The Adjutant General may not serve as a member of the board. All board members serve in their fede ally-recognized grade. Adjutants General may make arrangements for officers from outside their State to serve on the board.

a. The members of the board should possess wide command, management, and technical experience. Board members should be senior in federally-recognized grade to those being considered. As a minimum, the president of the board must be senior in grade to all officers being

considered, and all board members must be senior in rank to the highest ranking officer being considered.

b. Members of the advisory board will be selected by the Adjutant General. His action to appoint the board serves as approval for retention of those board members who are officers of the ANG under his jurisdiction, and they need not be considered by the board.

7. Organization of Advisory Board. The senior member of the board (in federally-recognized grade) will be appointed president of the board. The junior member will be designated recorder, or, at the option of the Adjutant General, an additional officer, without vote, may be appointed to the board to act as recorder.

8. Communications for Advisory Board.

a. The individual being considered for selective retention will be notified of pending action.

b. An individual being considered for selective retention may write a letter to the advisory board inviting attention to any matter of record concerning himself that he feels important in the review of his record.

c. Letters of commendation or appreciation will be forwarded through channels to the State Adjutant General for referral to the advisory board prior to the convening date of the board.

d. Unit commander impact statement identified in paragraph 10 will be submitted to the board president before the convening of the board. Statements will be forwarded through command channels, and comments may be added at each level of command if appropriate.

e. Unsolicited communications that contain criticism or reflect upon the character, conduct, or motives of any officer will not be given to the advisory board.

9. Personnel Data for Advisory Board. Prior to convening the board, personnel files of each officer being considered will be screened to ensure the following information is included:

a. Verification of 20 years service for retirement.

b. Date last physical completed.

c. Current physical waiver (if applicable).

NOTE: List of officers to be considered by the board will be matched against the listing furnished by the National Guard Bureau at least 30 days prior to the anticipated date of the board.

10. Procedures for Conducting Advisory Board. The board will assemble at the time and place designated by the president and proceed as follows:

a. The order appointing the board will be read.

b. The following oath will be administered to the members by the recorder:

"You (identify each member by grade and name) do swear (or affirm) that you will faithfully, without prejudice or partiality, and having in view both the special fitness of individuals and the efficiency of the Air National Guard, perform duties imposed upon you, and further that you will not divulge the proceedings or results of this board except to proper authority. So help you god."

c. The following oath will be administered to the recorder by the president of the board:

> "You (identify by grade and name) do swear (or affirm) that you will faithfully, without prejudice or partiality, and having in view both the special fitness of individuals and the efficiency of the Air National Guard, perform duties imposed upon you as a member and recorder of this board, and further that you will not divulge the proceedings or results of this board except to proper authority. So help you God."

d. The board will review all documents and make an evaluation of the future benefits that can be expected to accrue to the Air National Guard from the continued service of each officer it considers. When the capability of a military unit will be affected by the loss of an officer being considered, recommendations from appropriate commanders should be included in the record before the board.

e. In arriving at an evaluation, the board should consider but not be limited to the following:

(1) Demonstrated performance and potential as reflected by the officer's effectiveness reports, training reports and letters of commendation.

(2) The availability of the individual for military activities in light of the demands of his civilian occupation.

(3) Past record of interest in and dedication to the Air National Guard.

(4) Status with regard to Air Technician retirement eligibility.

(5) Rated capability and potential as a crew-member in future years (rated only).

(6) Availability of replacement officer with less service who may be lost due to mandatory promotion if high grade vacancies do not exist.

(7) The ratio of officers in an age or service bracket as relates to maintaining an age/grade/service balanced force.

(8) Growth potential for replacing present leaders.

(9) Latest report of medical examination and physical fitness.

(10) Other factors bearing on a plan for assuring a viable combat ready military unit in future years.

f. The recommendations of the board are advisory only. Nevertheless, the members of the board must be aware that their recommendations will largely determine which officers are retained.

11. Actions on Advisory Board Reports:

a. Board:

(1) Other than the reports outlined in (2) and (3) below, no record of board proceeding will be prepared.

(2) A report of the board actions and recommendations will be submitted to the State Adjutant General for approval. (attachment 3).

(3) Any member of the board who disagrees with the recommendations of the majority of the board may submit a minority report. The member will sign both the

minority report and the board proceedings, indicating on the board proceedings that the minority report is being submitted as an attachment (attachment 4).

b. State Adjutant General:

(1) The State Adjutant General will review the recommendations of the advisory Board, including minority reports, and may approve or disapprove any specific recommendations.

(2) Upon the conclusion of his review the Adjutant General will make a report to the Chief, National Guard Bureau to the effect that selective retention review of the eligible officers of his State has been completed and that he approves retention or nonretention of the listed officers and warrant officers (attachments 5 and 6). Withdrawal of Federal recognition will be effective not earlier than the last day of the second month following the date of the Adjutant General's report to the National Guard Bureau. The Adjutant General may specify a later date for withdrawal of Federal recognition, but in no case later than 31 December of the current year.

(3) The Adjutant General will notify each officer concerned of the determination made as to his retention or separation (atchs 7 and 8).

c. Chief, National Guard Bureau:

(1) The Chief, National Guard Bureau will publish orders withdrawing Federal recognition of all officers not recommended for retention. The Adjutant General will be provided copies of the order withdrawing Federal recognition and will take necessary action to discharge the

officer from the State and transfer him in grade to the Air Force Reserve in accordance with ANGR 36-05.

12. Separation for Other Reasons. This regulation in no way precludes initiation of action to separate an officer as specified in ANGR 3[illegible]5 or 36-014 before the effective date of discharge under this regulation. If action is initiated to separate an officer for other reasons, separation under this regulation will be delayed until that action is completed.

13. Administrative Actions. If through administrative error an eligible officer is not considered as required by this regulation, or if the action taken as to any officer under this regulation is later set aside by competent authority, the Chief, National Guard Bureau may take one of the following actions:

a. Request that the Adjutant General concerned reconvene the board for the purpose of considering or reconsidering the affected officer.

b. Request that the Adjutant General concerned convene a new board for the purpose of considering or reconsidering the affected officer.

c. Waive, for the year in question only, the requirement that the affected officer be considered under this regulation. This action will be taken only when the Chief, National Guard Bureau determines that it is clearly required in the interest of justice and fairness, or that the passage of time makes it impractical to consider or reconsider the officer for the year in question before he is considered in due course for the following year.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

LA VERN E. WEBER, Major General, USA
Chief, National Guard Bureau

ROBERT H. NEITZ, Colonel, USAF
Executive, National Guard Bureau

SUMMARY OF REVISED, DELETED, OR ADDED MATERIAL

This regulation provides revised guidance on establishing and conducting selective retention advisory boards. It deletes the requirement for general officers to be considered by the board and adds authorization for tenure of office officers to serve on the board. The schedule for conducting the board is revised to provide the Adjutant General additional flexibility. Discharge provisions are changed to allow for separation at a date determined by the Adjutant General.

APPENDIX 10

NATIONAL GUARD TECHNICIANS ACT OF 1968

For Legislative History of Act, see p 3318

PUBLIC LAW 90-486; 82 STAT. 755

[S.3865]

An Act to clarify the status of National Guard technicians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "National Guard Technicians Act of 1968".

Sec. 2. Title 32, United States Code,[34] is amended as follows:

(1) Section 709 is amended to read as follows:

"§ 709. Technicians: employment, use, status

"(a) Under regulations prescribed by the Secrtary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in –

"(1) the administration and training of the National Guard; and

"(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

"(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

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[34] 32 U.S.C.A. § 709.

"(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.

"(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

"(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned –

"(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

"(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

"(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

"(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

"(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

"(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

"(f) Sections 2108, 3502, 7511, and 7512 of title 5, United States Code, do not apply to any person employed under this section.

"(g) (1) Notwithstanding sections 5544(a) and 6102 of title 5, United States Code, or any other provision of law, the Secretary concerned may, in the case of technicians assigned to perform operational duties at air defense sites –

"(A) prescribe the hours of duties;

"(B) fix the rates of basic compensation; and

"(C) fix the rates of additional compensation;

to reflect unusual tours of duty, irregular additional duty, and work on days that are ordinarily nonworkdays. Additional compensation under the subsection may be fixed on an annual basis and is determined as an appropriate percentage, not in excess of 12 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 of the General

Schedule under section 5332 of title 5, United States Code.

"(2) Notwithstanding sections 5544(a) and 6102 of title 5, United States Code, or any other provision of law, the Secretary concerned may, for technicians other than those described in clause (1) of this subsection, prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5, United States Code, or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

"(h) In no event shall the number of technicians employed under this section at any one time exceed 42,500."

(2) The analysis of chapter 7 is amended by striking out the following item:

"709. Caretakers and clerks."

and inserting in place thereof the following item:

"709. Technicians: employment, use, status."

(3) Section 715(a)[35] is amended by striking out "caused by a person employed under section 709 of this title acting within the scope of his employment;".

Sec. 3. (a) A claim accrued under section 715 of title 32, United States Code, before the effective date of this Act by reason of the act or omission of a person

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[35] 32 U.S.C.A. § 715(a).

employed under section 709 of title 32, United States Code, may, if otherwise allowable, be settled and paid under section 715 of title 32, United States Code.

(b) Except as provided in this Act and in the amendments made by this Act, and notwithstanding any law, rule, regulation, or decision to the contrary, the positions of persons employed under section 709 of title 32, United States Code, existing on the day before the effective date of this Act, and the persons holding those positions on that day, shall, on and after that effective date, be considered to be positions in and employees of the Department of the Army or the Department of the Air Force, as the case may be, and employees of the United States to the same extent as other positions in and employees of the Department of the Army or the Department of the Air Force. Such positions shall be outside the competitive service, if, as a condition of employment, the persons employed therein were, on the day before the effective date of this Act, required to be members of the Army National Guard or the Air National Guard.

(c) All service under section 709 of title 32, United States Code, or prior corresponding provision of law, performed before the effective date of this Act shall be included and credited in the determination of length of service for the purposes of leave, Federal employees death and disability compensation, group life and health insurance, severance pay, tenure, and status. This subsection shall apply only in the case of persons who perform service under section 709 of title 32, United States Code, on or after the effective date of this Act.

(d) Annual leave and sick leave to which a technician was entitled on the day before the conversion of his position, as provided in subsection (b) of this section, shall be credited to him in his new position.

Sec. 4. Section 2105(a) of title 5, United States Code,[36] is amended –

(1) by striking out "or" at the end of clause (1) (D);

(2) by adding "or" at the end of clause (1) (E); and

(3) by adding the following new subclause (F) at the end of clause (1):

"(F) the adjutants general designated by the Secretary concerned under section 709(c) of title 32, United States Code;".

Sec. 5. (a) Section 8332(b) of title 5, United States Code,[37] is amended –

(1) by striking out "and" at the end of clause (4);

(2) by striking out the period at the end of clause (5) and inserting in place thereof "; and"; and

(3) by adding the following new clause:
"(6) employment under section 709 of title 32, United States Code or any prior corresponding provision of law."; and

(4) by adding at the end thereof the following:

"Service referred to in paragraph (6) is allowable only in the case of persons performing service under section 709 of title 32, United States Code, on or after the effective date of the National Guard Technicians Act of 1968."

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[36] 5 U.S.C.A. § 2105(a).

[37] 5 U.S.C.A. § 8332(b).

(b) Section 8334(c) of title 5, United States Code,[38] is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this subsection, the deposit with respect to a period of service referred to in section 8332(b) (6) which was performed prior to the effective date of the National Guard Technicians Act of 1968 shall be an amount equal to 55 per centum of a deposit computed in accordance with such provisions."

(c) Section 8339 of title 5, United States Code,[39] is amended by adding at the end thereof the following new subsection:

"(1) In determining service for the purpose of computing an annuity under each paragraph of this section, 45 per centum of each year, or fraction thereof, of service referred to in section 8332(b) (6) which was performed prior to the effective date of the National Guard Technicians Act of 1968 shall be disregarded."

(d) Clause (4) of subsection (a) of this section and subsections (b) and (c) of this section do not apply to any person employed prior to the effective date of this Act under section 709 of title 32, United States Code, whose employment under that section was covered by subchapter III of chapter 83 of title 5, United States Code.

Sec. 6. (a) Notwithstanding section 709(d) of title 32, United States Code, a person who, on the date of enactment of this Act, is employed under section 709 of title

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[38] 5 U.S.C.A. § 8334(c).

[39] 5 U.S.C.A. § 8339(1).

32, United States Code, and is covered by an employee retirement system of, or plan sponsored by, a State or the Commonwealth of Puerto Rico, may elect, not later than the effective date of this Act, not to be covered by subchapter III of chapter 83 of title 5, United States Code, and with the consent of the State concerned or Commonwealth of Puerto Rico, to remain covered by the employee retirement system of, or plan sponsored by, that State or the Commonwealth of Puerto Rico. Unless such an election, together with a statement of approval by the State concerned or the Commonwealth of Puerto Rico, is filed with the Secretary of the Army or the Secretary of the Air Force, as appropriate, on or before the effective date of this Act, the person concerned is covered by subchapter III of chapter 83 of title 5, United States Code, as of that date.

(b) A member of the National Guard of a State or the Commonwealth of Puerto Rico who was employed as a technician under section 709 of title 32, United States Code, or prior corresponding provision of law, who –

(1) was involuntarily ordered to active duty after January 1, 1968, from that employment and has not been released from that duty prior to the effective date of this Act; or

(2) is on active duty under section 265, 3015, 3033, 3496, 8033 or 8496 of title 10, United States Code, on the effective date of this Act;

and was covered by a retirement system or plan of a State or the Commonwealth of Puerto Rico, may, if he is reemployed within sixty days under section 709 of title 32,

United States Code, make the election described in subsection (a) of this section, within thirty days following the date of his reemployment.

(c) In the case of any person who files a valid election under this section to remain covered by an employee retirement system of, or plan sponsored by, a State or the Commonwealth of Puerto Rico, the United States may pay the amount of the employer's contributions to that system or plan that become due for periods beginning on or after the effective date of this Act. However, the payment by the United States, including any contribution that may be made by the United States toward the employer's tax imposed by section 3111 of the Internal Revenue code of 1954, as amended (26 U.S.C. 3111), may not exceed the amount which the employing agency would otherwise contribute on behalf of the person to the Civil Service Retirement and Disability Fund under section 8334(a) of title 5, United States Code. Notwithstanding section 8332(b) of title 5, United States Code, as amended by section 5 of this Act, the service under section 709 of title 32, United States Code, or prior corresponding provisions of law, of a person who has made an election to remain covered by the employee retirement system of, or plan sponsored by, a State or the Commonwealth of Puerto Rico, shall not be creditable toward eligibility for or amount of annuity under subchapter III of chapter 83 of title 5, United States Code. A person who retires pursuant to his valid election shall not be eligible for any rights, benefits, or privileges to which retired civilian employees of the United States may be entitled.

Sec. 7. The fourth sentence of section 218(b) (5) of the Social Security Act, as amended (42 U.S.C. 418(b) (5)),[40] is is amended to read as follows: "Persons employed under section 709 of title 32, United States Code, who elected under section 6 of the National Guard Technicians Act of 1968 to remain covered by an employee retirement system of, or plan sponsored by, a State or the Commonwealth of Puerto Rico, shall, for the purposes of this Act, be employees of the state or the Commonwealth of Puerto Rico and (notwithstanding the preceding provisions of this paragraph), shall be deemed to be a separate coverage group".

Sec. 8. (a) Except as provided in section 709(g) of title 32, United States Code, the Secretary concerned shall fix the rate of basic compensation of positions existing on the date of enactment of this Act in accordance with the General Schedule set forth in section 5332, or under the appropriate prevailing rate schedule in accordance with section 5341 of title 5, United States Code, as applicable. In fixing such rate –

(1) If the technician is receiving a rate of basic compensation which is less than the minimum rate of the appropriate grade of the General Schedule, or which is less than the minimum rate of the appropriate grade or compensation level of the appropriate prevailing rate schedule, as applicable, in which his position is placed, his basic compensation shall be increased to that minimum rate.

(2) If the technician is receiving a rate of basic compensation which is equal to a rate of the appropriate grade of the General Schedule, or which is

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[40] 42 U.S.C.A. § 418(b) (5).

equal to a rate of the appropriate grade or compensation level under the appropriate prevailing rate schedule, as applicable, in which his position is placed, he shall receive basic compensation at that rate of the General Schedule, or at that rate under the prevailing rate schedule, as applicable.

(3) If the technician is receiving a rate of basic compensation which is between two rates of the appropriate grade of the General Schedule, or which is between two rates of the appropriate grade or compensation level under the appropriate prevailing rate schedule, as applicable, in which his position is placed, he shall receive basic compensation at the higher of those two rates under the General Schedule or appropriate prevailing rate schedule, as applicable.

(4) If the technician is receiving a rate of basic compensation which is in excess of the maximum rate of the appropriate grade of the General Schedule, or which is in excess of the maximum rate of the appropriate grade or compensation level of the appropriate prevailing rate schedule, as applicable, in which his position is placed, he shall continue to receive basic compensation without change in rate until –

(A) he leaves that position, or

(B) he is entitled to receive basic compensation at a higher rate,

but, when any such position becomes vacant, the rate of basic compensation of any subsequent appointee thereto shall be fixed in the manner provided by applicable law and regulation.

(b) The conversion of positions and employees to appropriate grades of the General Schedule set forth in section 5332 of title 5, United States Code, and the initial

adjustment of rates of basic compensation of those positions and technicians, provided for by this Act, shall not be considered to be transfers or promotions within the meaning of section 5334(b) of title 5, United States Code, and the regulations issued thereunder.

(c) Each technician on the effective date of this Act whose position is converted to the General Schedule set forth in section 5332 of title 5, United States Code, or to the appropriate prevailing rate schedule, as applicable, who prior to the initial adjustment of his rate of basic compensation under subsection (a) of this section, has earned, but has not been credited with, an increase in that rate, shall be granted credit for such increase before his rate of basic compensation is initially adjusted under that subsection.

(d) Each technician on the effective date of this Act whose position is converted to the General Schedule set forth in section 5332 of title 5, United States Code, or to the appropriate prevailing rate schedule, as applicable, shall be granted credit, for purposes of his first step increase under the General Schedule or prevailing rate schedule, for all satisfactory service performed by him since his last increase in compensation prior to the initial adjustment of his rate of basic compensation under subsection (a) of this section.

(e) An increase in rate of basic compensation by reason of the enactment of subsection (a) of this section shall not be considered to be an equivalent increase with respect to step increases for technicians whose positions are converted to the General Schedule set forth in section

5332 of title 5, United States Code, or the appropriate prevailing rate schedule under authority of this section.

Sec. 9. Title 10, United States Code, is amended as follows:

(1) Sections 3848(c)[41] and 3851(c)[42] are each amended to read as follows:

"(c) Notwithstanding subsections (a) and (b) of this section, the Secretary of the Army may authorize the retention in an active status until age 60 of any officer of the Army National Guard of the United States who would otherwise be removed from an active status under this section and who –

"(1) is assigned to a headquarters or headquarters detachment of a State or territory, the Commonwealth of Puerto Rico, the Canal Zone, or the District of Columbia; or

"(2) is employed as a technician under section 709 of title 32, United States Code, in a position for which Army National Guard membership is prescribed by the Secretary."

(2) Sections 8848[43] and 8851[44] are each amended by adding the following new subsection:

"(c) Notwithstanding subsections (a) and (b) of this section, the Secretary of the Air Force may authorize the retention in an active status until age 60 of any officer of the Air National Guard of the United States who would

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[41] 10 U.S.C.A. § 3848(c)

[42] 10 U.S.C.A. § 3851(c)

[43] 10 U.S.C.A. § 8848(c)

[44] 10 U.S.C.A. § 8851(c).

otherwise be removed from an active status under this section and who is employed as a technician under section 709 of title 32, United States Code, in a position for which Air National Guard membership is prescribed by the Secretary."

Sec. 10. Regulations prescribed by the Secretary of the Army and Secretary of the Air Force under this Act shall be approved by the Secretary of Defense and shall, so far as practicable, be uniform.

Sec. 11. This Act becomes effective January 1, 1969, except that no deductions or withholding from salary which result therefrom shall commence before the first day of the first pay period that begins on or after January 1, 1969.

Approved August 13, 1968.